IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Joseph E. Atkins, Petitioner, v. Michael Moore, Commissioner, South Carolina Department of Corrections; Charles Condon, Attorney General, State of South Carolina, Respondents.	)	C.A. No. 3:96-2859-22 **ORDER**

I. INTRODUCTION

Petitioner, a death-row inmate, brought this habeas corpus action, pursuant to 28 U.S.C. § 2254, on January 15, 1997. He claims numerous errors arising from his three murder convictions, capital sentencing proceeding and subsequent state reviews spanning a 27 year period. There is no dispute that Petitioner actually killed three people, but he challenges whether those killings constitute murder, and what consequences may attach to those convictions. The matter is before the court on Respondents' Motion for Summary Judgment on all claims asserted in the Petition for Writ of Habeas Corpus.

For the reasons set forth below, the court finds that Respondents' Motion for Summary Judgment is well-founded and should be GRANTED. Other pending motions are decided as well.

Pursuant to an expedited briefing schedule established by the court by order of January 15, 1997, and amended on February 4, 1997, Respondents (hereinafter "the State") filed their Return and Motion and Memorandum in Support of Summary Judgment on February 28, 1997. The State submitted a Supplemental Return on March 4, 1997. This included additional materials relating to state postconviction proceedings arising out of the two 1985 murders for which Petitioner was convicted and the separate state postconviction proceedings commenced in 1987 arising out of the 1970 murder for which Petitioner was also convicted. The 1970 conviction served as the sole aggravating circumstance for Petitioner's current death sentences. On April 1, 1997, Petitioner, by appointed counsel, filed his Memorandum of Law in Support of the Petition for Writ of Habeas Corpus and in Opposition to Respondents' Motion for Summary Judgment. On the same date Petitioner also filed his Motion for an Evidentiary Hearing and a Motion to Expand and Correct the Record.

In order to meet the time requirements established in the Fourth Circuit Judicial Council's Order No. 113 dated October 3, 1996, (district courts henceforth required to render a decision in a death penalty case within 180 days of the date of the petition being filed), this case was not referred to a United States Magistrate Judge for a Report and Recommendation. Rather, this court has conducted all proceedings and completed the appropriate review. The court has now reviewed the extensive record in this matter, including the twelve-volume Appendix ordered by the court to be filed in September 1996, four months before the Petition's filing date,[1] as well as all subsequently filed briefs and records. The court finds that all issues have been amply briefed and argued, where necessary, and that all matters are ripe for adjudication.

II. FACTS

The following facts are drawn from the complete record before the court.

Events relevant to the Petition begin in 1970 shortly after Petitioner returned to Charleston from a tour of active duty in Vietnam. Petitioner and his brother, Charles, were visiting friends on December 31, 1969, when the two brothers had an altercation. Petitioner left the friends' residence, and returned to his father's house, a distance of several miles. In an agitated state, he then retrieved, over his father's objections, a shotgun and returned to the friends' residence, where he fatally shot his brother. As he left the friends' home, Petitioner shot out the front windows of the residence.

Petitioner was indicted at the March 1970 term of General Sessions Court for Charleston County. He was represented by retained counsel, Thomas P. Lesesne, III, who is now deceased. Mr.

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[1]At the hearing on Petitioner's request for a stay of execution, the court directed counsel to submit the most voluminous parts of the record in advance of the Petition's filing date so that the court could conduct its examination of the prior proceedings before the Petition was filed, and could therefore be in a position to move expeditiously in this proceeding.

Lesesne had previously represented Charles. The Solicitor, Robert Wallace, had agreed to a plea of voluntary manslaughter. Accordingly, on May 28, 1970, the Solicitor, Mr. Lesesne and Petitioner appeared before Judge Clarence Singletary. When asked to give the court his version of events Petitioner answered "he [Charles] reached back like this in his back pocket where he had his gun, and I was scared he was going to shoot." (Supp. App. I at 16-17). Judge Singletary explained he could not accept a manslaughter plea if Petitioner claimed he shot in self-defense. The guilty plea was aborted, and Petitioner proceeded immediately to trial. The jury rejected Petitioner's claim of self-defense and found Petitioner guilty of murder, recommending mercy. Petitioner was sentenced to life imprisonment. On June 8, 1970, Mr. Lesesne filed a Notice of Intent to Appeal. The appeal, however, was never perfected. It was, therefore, deemed abandoned. Petitioner was paroled from the 1970 conviction on March 14, 1980. After his release from prison, Petitioner returned to North Charleston to live, where he occupied one-half of a duplex owned by his father, Benjamin Atkins. Petitioner worked odd jobs and had a habit of drinking regularly. His girlfriend, Linda Walters, lived with him.

Petitioner's father lived in the other half of the duplex. A rental house owned by the father was located behind the duplex. In the spring of 1985, Mr. Aaron Polite, his wife, Fatha Patterson, and their thirteen-year old daughter, Karen Patterson, moved into the rental home. Petitioner was barely acquainted with Mr. Polite and his family. Petitioner's dealings with them were limited to casual greetings.

Petitioner and a neighbor, Arthur Henderson, were drinking heavily on the night of Saturday, October 26, 1985. They bought and consumed two and one-half pints of Smirnoff Vodka. Petitioner returned home early the next morning. At about 6:30 a.m., while the Polite family was asleep, Mr.

Polite awakened to see Petitioner, carrying a machete and a sawed-off shotgun, walking from the back of the rental house to his side of the duplex. Mr. Polite awakened Fatha, and related what he had seen. She began to call Petitioner's father, Benjamin Atkins, but found that the phone lines were dead. Upon inspection of the outside telephone wires, Aaron and Fatha discovered that their phone lines had been cut. Aaron returned to the bedroom, and Fatha left to alert Petitioner's father.

Shortly thereafter, Aaron heard a gunshot from within his house. He spotted Petitioner, armed with a sawed-off single-shot shotgun, standing at the doorway of Karen's bedroom. Petitioner began shooting in Aaron's direction, but Aaron jumped out of the line of fire, running into the yard. Petitioner pursued Aaron, and continued discharging the weapon. After Aaron ran into the street, Petitioner retreated and headed for his father's home.

Petitioner's father and Fatha heard the gunshots and summoned the police. Fatha opened the screen door of the father's duplex and spotted Petitioner aiming the shotgun at her. As she backed away screaming, Petitioner's father stepped out onto the porch. Petitioner shot his father in the right shoulder area. The father staggered back into his kitchen, where he collapsed and died.

Fatha shut the door and ran to the bedroom to get a telephone. Petitioner began shooting randomly at the side of the duplex, where gunshots came through the wall. Petitioner also shot out a window in his father's car. Petitioner mounted his motorcycle and began pulling out of the driveway. Aaron and Fatha ran to their house to check on Karen. They found her in her bed lying in a pool of blood caused by a massive gunshot wound to the head. She also suffered a wound to her right hand. Karen was taken to the hospital, where she died a few hours later.

In the meantime, a neighbor, Detective Schuster of the Charleston police, had just gone off-duty and was returning home at the time of the shooting. He saw the flash of gunfire and Petitioner

pulling out of the driveway, with a revolver in his back pocket. Schuster called for backup, and pursued Petitioner for four miles. Schuster and other officers then subdued Petitioner as he fell off his motorcycle and arrested him. Police retrieved the shotgun a few blocks from Petitioner's house, along the escape route. The machete and shotgun shells were retrieved from the backyard.

III. PROCEDURAL HISTORY IN STATE COURT

A. 1970 Murder Conviction

This case presents a long and convoluted procedural history of Petitioner's convictions of the 1970 and 1985 killings.

Petitioner was indicted in January 1986 for two counts of murder, burglary, unlawful possession of a sawed-off shotgun, two counts of assault with intent to kill, and unlawful possession of a pistol. The solicitor sought the death penalty for each killing, claiming that Petitioner's 1970 murder conviction served as an aggravating circumstance.

On June 6, 1986, just prior to trial on the 1985 killings, Petitioner filed an Application for Post Conviction Relief (hereinafter "PCR") claiming ineffective assistance of counsel in the 1970 conviction. Petitioner was appointed PCR counsel, Frank Barnwell. In his application Petitioner claimed that he had ineffective assistance of counsel at the 1970 trial, that no transcript had ever been prepared, that he had no counsel to perfect a direct appeal, and that his trial counsel had not perfected the appeal. On the application Petitioner explained that "my notice of appeal was filed, but the appeal was never perfected for want of the necessary fees and costs for which I was without resources to pay." (1970 PCR App. p. 2, § 6.) He stated that his father, who he fatally shot in 1985, had converted money from the sale of Petitioner's car, which was to have been used to finance the

appeal. The PCR proceeding continued through the state courts.[2] Prior to the time of hearing, however, 1970 trial counsel Lesesne died on October 3, 1986. In March 1987, Respondents moved to have the PCR application summarily dismissed on the basis of Petitioner's alleged lack of diligence in processing the then 17-year old claim, laches, and prejudice. Respondents asserted prejudice from the delay because Lesesne was by then deceased and no defense counsel file could be located. After a hearing before Judge McLeod on the PCR application, the court granted Respondents' motion to dismiss on the basis of laches. (Respondents' Supp. Return, filed March 5, 1997). The court found that Petitioner had presented no just cause or excuse for the delay and that the State had been prejudiced by the death of all relevant witnesses, including Lesesne and Petitioner's father. In the alternative, the court also found that Petitioner's claims of ineffectiveness were without merit. On March 9, 1988, the state supreme court denied Petitioner's Writ of Certiorari, which raised two issues:

> 1. Did the State's use of Petitioner's 1970 murder conviction as a statutory aggravating circumstance in a 1986 murder prosecution justify Petitioner's sixteen year delay in seeking post-conviction relief from the 1970 prosecution?
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> 2. Did the State make a showing of prejudice sufficient to justify dismissal of Petitioner's post-conviction relief application on grounds of laches when the only allegation raised was whether Petitioner made a knowing and intelligent waiver of his right to appeal his 1970 murder conviction?

The Supreme Court's order denying the writ was a one-line summary disposition that simply stated, "Petition for Writ of Certiorari denied." (*Id.*) Petitioner failed thereafter to initiate any federal habeas corpus action challenging this ruling until the instant petition, which combines challenges relating to the 1985 killings, was filed nine years later in January 1997.

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[2]In the meantime, the trial of the 1985 charges proceeded.

B. 1985 Murder Convictions

At his trial on the two 1985 killings, Petitioner was represented by the County Public Defender and an appointed lawyer. After a jury trial on June 23-25, 1986, Judge John Hamilton Smith presiding, Petitioner was found guilty on all counts by the jury. The sentencing phase of the trial was held on June 27-28, 1986, at the conclusion of which Petitioner was sentenced to death on each murder conviction. He received additional sentences of life imprisonment, three ten year sentences, and a one year sentence, all consecutive, on the other charges.

Petitioner was represented on appeal by David I. Bruck. He submitted a Petition to Argue Against Precedent, which sought to modify or overrule existing South Carolina law as to the reasonable doubt instruction given in Petitioner's 1986 trial. The Supreme Court denied the Petition. Other issues raised in the initial direct appeal included:

> 1. Did the trial judge err by denying appellant's statutory right to have his counsel examine the prospective jurors Manigault, Phillips, Locklair and Worth prior to their disqualification on the basis of their opposition to the death penalty?
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> 2. Did the trial judge err by refusing appellant's request to submit involuntary manslaughter as a possible verdict with respect to the homicide of Karen Patterson?
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> 3. Did the trial judge err by failing to instruct the jury that a defendant may be guilty of assault of a high and aggravated nature rather than assault with intent to kill even when the assault is accompanied by malice, if the assailant did not intend to kill?
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> 4. Under the particular facts of this case, did the trial judge's failure to provide the jury with accurate information concerning parole eligibility, or to instruct the jury on the law governing parole consideration in capital sentencing, violate due process or the Eighth Amendment?

Petitioner succeeded in this first direct appeal. By opinion dated August 24, 1987, the state supreme court affirmed the murder convictions, but reversed the death sentences. *State v. Atkins,* 360 S.E.2d 302 (S.C. 1987). The Supreme Court found that the trial court erred by denying

Petitioner's statutory right to examine jurors prior to their disqualification on the basis of their opposition to the death penalty. The court remanded for a new sentencing trial as to the 1985 murder convictions.

The capital resentencing proceedings were assigned to Judge Cottingham and Petitioner had three newly appointed counsel at the resentencing trial that began in January 1988. As before, the only aggravating circumstance upon which the Solicitor relied was Petitioner's conviction for the 1970 murder of his brother. Petitioner's counsel filed pretrial motions to strike the 1970 murder conviction because of trial counsel's deficiencies and alleged improper burden shifting charges on malice and self-defense. The trial court refused to strike the 1970 murder conviction as an aggravating circumstance but permitted Petitioner to introduce evidence concerning the 1970 murder in mitigation of punishment. At trial Petitioner's counsel stipulated to the fact that Petitioner had a 1970 murder conviction. However, counsel introduced the transcript of the 1970 trial and aborted plea in an effort to prove mitigating circumstances. Judge Cottingham also instructed the jury that since the time of Petitioner's 1970 trial, the law of malice and self-defense had changed in South Carolina and that the burden of proof was no longer on Petitioner as to those two issues, as it had been at the 1970 trial. He further instructed the jury that "it is for your determination as to whether or not the 1970 murder conviction would be used as an aggravating circumstance in this case." The jury returned a recommendation of death as to both murder convictions, which Judge Cottingham imposed.

In Petitioner's second direct appeal, handled by newly appointed counsel, Petitioner once again sought to argue against precedent on the reasonable doubt charge used in the resentencing trial. The state supreme court again denied this application. Appellate counsel briefed the following issues

in Petitioner's second direct appeal:

> 1. Whether the trial court erred in precluding appellant from introducing evidence, both at a pre-trial hearing and during his sentencing retrial, relevant to the circumstances surrounding appellant's prior conviction of murder, which was the only aggravating circumstance relied upon by the State?
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> 2. Whether the trial court erred in instructing the jury that evidence relevant to appellant's prior conviction of murder could only be considered in mitigation of punishment?
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> 3. Whether the trial court erroneously instructed the jury both that it could not recommend consecutive life sentences and that if appellant were sentenced to consecutive life terms he would still be eligible for parole in twenty years?
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> 4. Was it error for the solicitor to imply during his examination of several witnesses that appellant was racially prejudiced?
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> 5. Whether the trial court erroneously instructed the jury that it had not deliberated long enough in response to a note from the jury indicating it was "hung?"
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> 6. Did the Solicitor improperly ask several expert witnesses whether appellant's evidence satisfied the criteria for the applicable statutory mitigating circumstances?
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> 7. Whether the State should have been prevented from seeking the death penalty as a result of the solicitor's misconduct in subpoenaing confidential mental health records to his office prior to trial?
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> 8. Could the trial court's sentencing instructions have been understood by a reasonable jury to require that its findings as to the existence of mitigating circumstances be unanimous?
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> 9. Should the trial court have granted a mistrial due to the improper and prejudicial comments made by the solicitor during the course of his closing argument?
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> 10. Did the trial judge err in qualifying jurors Grimball and Leyh because both jurors were aware that appellant had been previously sentenced to death for this offense?
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> 11. Did the trial judge err in qualifying jurors Grimball, Bozard, Carson, and White even though these jurors were predisposed to sentence an individual guilty of murder to death?

In his Reply brief, Petitioner raised the following issues:

> 1. The trial court erred in refusing to permit appellant to introduce evidence rebutting the State's only aggravating circumstance, i.e., that appellant was a person with a prior conviction of murder.
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> 2. The parole instruction given by the trial court was an erroneous statement of law.
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> 3. The solicitor's cross-examination of appellant's expert witnesses about the existence or nonexistence of mitigating circumstances was a violation of state law.
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> 4. Appellant was prejudiced by having to exhaust his peremptory challenges on jurors who should have been excused by the trial court for cause.

By opinion filed October 8, 1990, the state supreme court affirmed both death sentences. The Supreme Court noted that Petitioner's direct appeal was consolidated with the mandatory review of Petitioner's sentence as required by S.C. Code Ann. § 16-3-25 (1985). As to Petitioner's challenge to the use of his 1970 murder conviction as an aggravating circumstance, the Supreme Court concluded that the "resentencing trial was not the proper forum for collateral attack upon that conviction." *State v. Atkins,* 399 S.E.2d 760, 762 (S.C. 1990). The Supreme Court noted that Petitioner's belated state postconviction application on the 1970 murder conviction had been previously dismissed by a trial court on the ground of laches and that the Supreme Court had denied his Petition for Writ of Certiorari from such denial. Shortly thereafter, the Supreme Court denied Petitioner's Petition for Rehearing. By order dated January 28, 1991, the South Carolina Supreme Court granted Petitioner a 90 day stay of execution to allow Petitioner to file a Writ of Certiorari to the United States Supreme Court. The Petition posed the following question to the Court:

> 1. Whether a state trial court may, consistent with the Eighth and Fourteenth Amendments, preclude a capital defendant from introducing evidence relevant to the circumstances surrounding a prior conviction which served as the State's only aggravating circumstance?

The United States Supreme Court denied Petitioner's Petition for Writ of Certiorari on June 28, 1991. *Atkins v. South Carolina,* 111 S.Ct. 2913 (1991). Following remand, the state supreme court granted Petitioner a 60 day stay of execution in order to commence state postconviction proceedings.

Petitioner filed his Application for PCR on September 30, 1991, and amended it several times thereafter. Judge Walter J. Bristow, Jr., Special Circuit Judge, held a full evidentiary hearing on August 16-17, 1992. Petitioner was represented by two court-appointed counsel.

In his postconviction application, Petitioner raised the following challenges:

> 1. Applicant was denied the effective assistance of counsel, in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of counsel's failure to investigate and present mitigating evidence.
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> 2. Applicant was denied the effective assistance of counsel at the guilt-or-innocence phase of his trial, in violation of South Carolina law and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, by trial counsel's failure to present a defense at applicant's guilt-or-innocence phase of his trial.
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> 3. Applicant was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the trial court's jury instruction on reasonable doubt during the guilt phase of applicant's trial.
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> 4. Applicant was denied the due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and South Carolina law by the trial court's jury instruction on reasonable doubt during the sentencing portion of applicant's trial.
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> 5. Applicant was denied due process of law as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and South Carolina law by the effectual insertion into the jury room of extraneous and arbitrary matter, to wit: the Bible as legal authority for imposition of the death penalty.
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> 6. The use of Applicant's prior 1970 murder conviction as the aggravating circumstance violates Applicant's rights as guaranteed by the Eight and Fourteenth Amendments to the United States Constitution and South Carolina law, in particular Section 16-3-20(B) of the South Carolina Code Ann., as being the result of a denial of Applicant's rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments

to the United States Constitution and South Carolina law.

> (a) The only aggravating circumstance supporting the death sentence in this case is that the Applicant was a person with a prior conviction for murder. This prior murder conviction was obtained as a result of the ineffective assistance of Applicant's trial counsel, Applicant's trial counsel's conflict of interest, improper burden shifting instructions on critical elements of the charged offenses, a faulty instruction on reasonable doubt, and a failure to give other instructions required by state and federal law.

7. The trial judge's instructions violated Applicant's rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and South Carolina law.

> (a) The trial judge instructed the jury as to a number of legal principles relevant to the jury's consideration of Applicant's 1970 conviction for murder. However, in doing so, the trial judge failed to instruct the jury as required by the South Carolina Supreme Court's decision in *State v. King,* 155 S.E. 409 (1930). More specifically, the trial judge failed to instruct the jury that if it had a reasonable doubt as to whether Atkins was guilty of murder or manslaughter in 1970, it was their duty to resolve that doubt in his favor. This omission was extremely prejudicial in light of the fact that the jury made a specific inquiry regarding the distinction between murder and manslaughter.

8. Ineffective assistance of counsel both at his trial and appeal in the 1986 (guilt or innocence trial):

> (a). Trial counsel failed to request the trial court to *voir dire* Applicant on his right to testify at the guilt phase.
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> (b). [Trial counsel] did not present a defense of guilty but mentally ill.
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> (c). Appellate counsel failed to raise on appeal the trial court's failure to *sua sponte voir dire* Applicant on his right to testify in the guilt phase.
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> (d). Trial and appellate counsel failed to raise the substantial issues regarding the reasonable doubt charge.
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> (e). Trial counsel failed to thoroughly investigate the circumstances

surrounding the lawsuit filed by victim Karen Patterson's family.

9. Ineffective assistance of trial and appellate counsel in the 1988 resentencing proceeding:

(a). Trial counsel failed to object to the judge's charge concerning the statutory mitigating circumstance of voluntary intoxication.

(b). Trial counsel and appellate counsel failed to raise the substantial issues regarding the reasonable doubt charge.

(c). Trial counsel failed to thoroughly investigate the circumstances surrounding victim Karen Patterson's family filing a $1 million lawsuit following her death.

(d). Trial counsel erred in waiving the defendant's right to have the parole eligibility issue not raised before the jury.

(i). The court failed to *voir dire* Atkins as to whether he was knowingly and intelligently waiving that right.

(ii). Failing to ask the court to charge parole eligibility on all convictions.

In his post-hearing memorandum, filed May 26, 1993, Petitioner identified the following claims in support of his application for relief:

1. Applicant was denied due process of law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and South Carolina law by the effectual insertion into the jury room of extraneous and arbitrary matter, to wit: the Bible as legal authority for the imposition of the death penalty.

2. Joseph Ernest Atkins was denied his right to the effective assistance of counsel at his sentencing retrial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14, of the South Carolina Constitution as a result of counsel's failure to develop and present available mitigating evidence.

3. The trial court's refusal to permit applicant to introduce evidence demonstrating the constitutional flaws in and unreliability of the prior conviction, which served as the only aggravating circumstance, violated applicant's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution.

> (a). Applicant was entitled to a pretrial hearing as to whether his 1970 murder conviction was constitutionally obtained, and he was entitled to present evidence at this sentencing retrial that the conviction was not a reliable conviction for the purposes of the statutory aggravating circumstance.

4. Joseph Ernest Atkins was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14, of the South Carolina Constitution, when his trial counsel failed to investigate and present impeachment evidence against a State witness, despite knowledge of that evidence.

5. Joseph Ernest Atkins was denied the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14, of the South Carolina Constitution.

> (a). Trial counsel failed to consider, investigate, or discuss with defendant the possibility of obtaining a verdict of guilty but mentally ill even though there was compelling evidence to support this verdict including substance abuse, post-traumatic stress disorder, and physical and emotional childhood abuse.

6. At the guilt-innocence phase of Applicant's 1986 trial and at Applicant's 1988 resentencing trial, the court's jury instructions regarding reasonable doubt lessened the State's burden of proof in violation of the Fourteenth Amendment of the United States Constitution and South Carolina law.

7. Applicant was denied the effective assistance of appellate counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

> (a). On direct appeal from Applicant's 1986 trial, appellate counsel David Bruck failed to raise the following issues:
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> > (i). The trial court erred in failing to obtain a waiver of Appellant's right to testify.
> >
> > (ii). The trial court's instruction regarding reasonable doubt impermissibly lessened the State's burden of proof in violation of the Fourteenth Amendment of the United States Constitution and South Carolina

law.

(b). On direct appeal from Applicant's 1988 resentencing trial, appellate counsel, Mr. John Blume, failed to raise the following issue:

(i). The trial court's instruction regarding reasonable doubt impermissibly lessened the State's burden of proof in violation of the Fourteenth Amendment of the United States Constitution and South Carolina law.

The court heard testimony or proffers of testimony from 17 witnesses, received depositions from three additional witnesses, and considered affidavits from three other witnesses. The court denied Petitioner's PCR application on March 17, 1994. Following a hearing on Petitioner's Motion to Alter or Amend the Judgment, the court denied the motion on July 2, 1994.

Petitioner appealed to the state supreme court from Judge Bristow's order. On March 31, 1994, Petitioner, by Deputy Chief Appellate Defender Savitz, filed a Petition for Writ of Certiorari raising the following claims:

1. Defense counsel did not provide effective assistance at Petitioner's resentencing where they failed to investigate and present evidence concerning a million-dollar lawsuit filed by the victim's mother the day after her daughter was killed.

2. Defense counsel did not provide effective assistance at Petitioner's resentencing where they failed to investigate and present adequate mitigating evidence, specifically, evidence of Petitioner's "social history" and expert testimony that he suffered from post-traumatic stress syndrome and not anti-social personality disorder, the diagnosis that was presented by the defense at resentencing.

3. Defense counsel did not provide effective assistance at Petitioner's resentencing where they stipulated as to the validity of the 1970 murder conviction and then failed to request a *King* charge where the judge instructed the jury on murder and voluntary manslaughter in relation to the jury's consideration of the 1970 homicide.

4. Defense counsel did not provide effective assistance at Petitioner's

resentencing where they requested an instruction that Petitioner would be eligible for parole in twenty years if sentenced to life for the murders, instead of an instruction which apprised the jury of Petitioner's parole eligibility on all the offenses of which he had been convicted or, alternatively, an instruction that life was to be understood "in its plain and ordinary meaning."

5. The resentencing jury improperly sentenced Petitioner to death on the basis of a juror's study of the Bible in her motel room after the jury had deadlocked ten-to-two and her discussion of the Old Testament view of capital punishment in the jury room the following day.

On May 7, 1996, while still represented by Mr. Savitz, Petitioner, acting *pro se,* sought leave to file a "Supplemental Petition for Writ of Certiorari," in which he attempted to raise an additional issue and in which he requested that the Post-Conviction Defender Organization be substituted as counsel for Mr. Savitz. In the *pro se* pleading Petitioner argued that:

1. Petitioner was denied the effective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 14, of the South Carolina Constitution by counsel's failure to pursue a verdict of guilty but mentally ill.

The Post-Conviction Defender Organization joined Petitioner's request to be substituted as counsel and for the court to consider the additional claim. The State opposed the request for substitution of counsel. On July 11, 1996, the state supreme court entered two letter orders. The first denied the request to substitute counsel. The second denied the Petition for Writ of Certiorari. Despite the court's denial of the motion to substitute counsel, the Post-Conviction Defender Organization filed a Petition for Rehearing and a Motion to Stay Execution. The State sought to strike the motion. On August 23, 1996, the court entered an order denying the Petition for Rehearing, Motion to Strike, and Motion to Stay Execution. The court established September 20, 1996, as the date of execution.

Petitioner then filed for a Writ of Certiorari to the United States Supreme Court on September 12, 1996, in which he raised the following two issues:

1. Whether the state court violated Petitioner's right to due process of law guaranteed by the Fourteenth Amendment by arbitrarily misapplying state evidentiary rules to deny him any meaningful opportunity to litigate a federal claim in state court?

2. Whether the state court's holding that a capital jury consider extraneous material--the Bible--during sentencing deliberations violated Petitioner's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments?

On September 19, 1996, the United States Supreme Court entered its order denying the Petition for a Writ of Certiorari and Stay of Execution. *Atkins v. Moore,* 117 S.Ct. 31 (1996).

IV. PROCEDURAL HISTORY OF § 2254 HABEAS CORPUS PROCEEDING

The instant proceedings commenced immediately upon the Supreme Court's denial of Petitioner's Petition for Writ of Certiorari. On September 19, 1996, Petitioner moved to proceed *in forma pauperis*, for a stay of execution, and for appointment of counsel John Blume and the Post Conviction Defender Organization. The State filed its return the same date, in which it opposed appointment of John Blume and the Post Conviction Defender Organization. The court granted the motion to stay execution and to proceed *in forma pauperis* that same day, and deferred ruling on the motion for appointment of counsel until a hearing could be scheduled later that day. At the hearing on September 19, 1996, the State contended that Petitioner had earlier challenged the effectiveness of Mr. Blume and that he should not now be permitted to have Mr. Blume represent him again without securing a waiver of those claims. By written order of September 20, 1996, the court appointed the Federal Public Defender, Parks Small, to represent Petitioner solely for the purpose of determining whether a conflict of interest existed with regard to Mr. Blume and to explain to Petitioner the consequences of any waiver he might make. The court set a second hearing for September 23, 1996. At the second hearing, Mr. Small represented that he had had adequate time

to confer with Petitioner as to the waiver issue. Petitioner's sworn testimony was that he understood he was waiving the right to raise any claim arising out of Mr. Blume's alleged ineffectiveness in earlier proceedings. After securing Petitioner's waiver, the court granted Petitioner's motion for appointment of John Blume and the Post Conviction Defender Organization as counsel. The court established January 15, 1997, as the deadline for Petitioner to file his § 2254 petition.

On January 15, 1997, nearly nine months after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Petitioner filed his Petition for Writ of Habeas Corpus in which he raised 23 grounds for relief. On the same date the court entered an order detailing the briefing schedule for the case and referencing the 180 day time limits imposed under the AEDPA.

On January 21, 1997, Petitioner filed a Motion for Reconsideration arguing: (1) that the time limits in Chapter 107 of the AEDPA did not apply to Petitioner's case, *citing Bennett v. Angelone,* 92 F.3d 1336 (4th Cir. 1996); and (2) that the court should stay all proceedings in this case pending the outcome of *Lindh v. Murphy,* 96 F.3d 856 (7th Cir. 1996) (*en banc)*, *cert. granted,* 117 S.Ct. 726 (1997). Following a telephone conference hearing on January 23, 1997, the court issued an order on February 4, 1997, in which it granted Petitioner's Motion for Reconsideration of the January 15, 1997, order but denied the request for a stay. In the February 4, 1997, order the court concluded that Council Order No. 113, filed October 3, 1996, by the Fourth Circuit Judicial Council, established strict time limits for death penalty cases. Therefore, the court exercised its discretion to endeavor to conclude this case within the time limits established by Chapter 154 of the AEDPA. The court also extended the briefing schedule for Petitioner's opposition to Respondent's Motion for Summary Judgment to March 28, 1997.

Petitioner argued that applying the AEDPA to Petitioner's case, which was litigated in the

state courts at a time when the State of South Carolina did not satisfy the opt in provisions of Section 107 of the Act, would be fundamentally unfair to Petitioner regardless of the fact that his Petition was filed after the effective date of the AEDPA. The State argued that the AEDPA's new provisions applied, but agreed that, for purposes of expediting this proceeding the court could pursue the course set forth in the February 4, 1997, order. The court determined that it would analyze the Petition under pre-AEDPA law. Only if the court concluded that the pre-AEDPA law required the grant of the writ, would the court await the decision in *Lindh.* Accordingly, the court has applied the pre-AEDPA standard of review throughout this order.[3]

As the parties recognized, the pre-AEDPA standard of review nevertheless requires the court to give deference to findings of fact by the state trial and appellate courts. *Cabana v. Bullock,* 474 U.S. 376 (1986). When a federal habeas court reviews a state conviction:

> The court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made. If it has, the finding must be presumed correct by virtue of 28 U.S.C. § 2254(d), *see Sumner v. Mata,* 449 U.S. 539 (1981), and unless the habeas petitioner can bear the heavy burden of overcoming the presumption, the court is obliged to hold that the Eighth Amendment . . . is not offended by the death sentence.

Cabana, 474 U.S. at 387-88. The presumption of correctness applies to factual findings by appellate courts as well as trial courts. *Sumner v. Mata,* 449 U.S. 539, 545-47 (1981).

On February 28, 1997, the State filed its Motion for Summary Judgment on all claims for relief. The State filed its Supplemental Return and Memorandum on March 4, 1997. Petitioner sought and was granted a second extension to file his opposition to summary judgment to April 1,

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[3]In light of the court's finding that Petitioner is not entitled to relief under pre-AEDPA law, it necessarily follows that he could not prevail under the AEDPA.

1997. On the same date Petitioner filed two additional motions: (1) Petitioner's Motion to Expand and Correct the Record; and (2) Petitioner's Motion for an Evidentiary Hearing. Following the court's initial review of the briefs, the court determined that Petitioner had not responded fully to all of the State's cited procedural defenses. By order of April 14, 1997, the court ordered Petitioner to file any additional reply concerning the procedural defenses within ten days. On April 16, 1997, Petitioner filed a Motion for Clarification of the April 14, 1997, order, which served the purpose of providing further response on these issues. The State filed its Reply to Petitioner's Motion for Clarification on April 29, 1997. On May 9, 1997, Petitioner filed a Reply to the State's Reply to the Motion for Clarification, which further addressed the procedural defense issues.

On May 8, 1997, the State filed its "Supplemental Citation of Authority," discussing the Fourth Circuit's April 24, 1997, opinion in *Smith v. Angelone,* 111 F.3d 1126 (4th Cir. 1997), regarding procedural default. On May 14, 1997, Petitioner filed his "Reply to Respondents' Supplemental Citation of Authority," in which Petitioner attempts to distinguish *Smith* and argues that his Ground 4 (asserting ineffectiveness of 1986 counsel in failing to raise possible GBMI defense) should be addressed on the merits.

Before addressing the merits of the State's Motion for Summary Judgment, the court will address Petitioner's several outstanding motions.

V. PETITIONER'S OUTSTANDING MOTIONS

A. Motion to Expand and Correct the Record

Petitioner moved, on April 1, 1997, to expand the record to include items omitted from the then-existing record, which comprises a ten bound volume Appendix, one Supplemental Appendix I and one Supplemental Appendix II. Petitioner seeks to expand the record to include the transcript

of motions hearings conducted in 1986 and 1988, juror questionnaires from the 1988 resentencing proceeding, affidavits of Drs. Malcolm and Crane prepared in 1992, and a subpoena directed to Dr. L. Randolph Waid, VA Hospital, to appear at Petitioner's resentencing proceeding and bring with him reports related to his 1986 examination of Petitioner.

As to the 1992 affidavit of Dr. Crane, it is unclear whether this affidavit was ever received in evidence in any state court proceeding. Although the affidavit was prepared just weeks after the state postconviction hearing before Judge Bristow, the order denying postconviction relief makes no reference to such exhibit ever having received in evidence. However, the March 17, 1994, order of Judge Bristow does make reference to this affidavit, and so it appears to have been considered to some degree by the court.

Omission of the other records appears due to mere inadvertence. The interests of justice require expanding the record to include these items, which are pertinent to many of Petitioner's grounds for relief. Accordingly, IT IS THEREFORE ORDERED that Petitioner's Motion to Expand and Correct the Record is GRANTED.

B. Motion for an Evidentiary Hearing

(i). General

On April 1, 1997, Petitioner filed his Motion for an Evidentiary Hearing on Grounds 1, 2, 3, 4, 9 and 10 of his Petition, and on the State's alleged procedural defenses.[4] Petitioner argued first, that under pre-AEDPA law in § 2254(d) and *Townsend v. Sain,* 372 U.S. 293 (1963), he was entitled

[4]Grounds 1, 2 and 3 challenge Petitioner's 1970 murder conviction; Ground 4 addresses counsel's alleged failure to pursue a guilty but mentally ill verdict at Petitioner's first trial; Ground 9 concerns the jury's alleged consideration of the Bible during its deliberations; and Ground 10 asserts counsels' alleged ineffectiveness at the 1988 resentencing trial.

to an evidentiary hearing on these issues. In the alternative, Petitioner argued that the court should exercise its discretion to conduct a hearing. Petitioner contends that the factual findings contained in the state postconviction order are not entitled to the presumption of correctness contained in the (former) § 2254(d). The State believes that its Motion for Summary Judgment can be resolved without conducting an evidentiary hearing.

The threshold determination of whether a federal habeas court must hold its own evidentiary hearing has long been controlled by *Townsend* and (former) 28 U.S.C. § 2254(d). In *Townsend* the Court held that as a general matter a federal hearing must be held if the applicant alleges disputed facts that, if true, would entitle the applicant to relief. Thus, under *Townsend* a federal habeas court must hold its own hearing if it finds any of the following circumstances:

> (1) that the merits of the factual dispute were not resolved in the state court hearing;
>
> (2) that the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the state court hearing;
>
> (4) that the state court lacked jurisdiction of the subject matter or over the person of the applicant in the state court proceeding;
>
> (5) that the applicant was an indigent and the state court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the state court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the state court proceeding;
>
> (8) or unless that part of the record of the state court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as

> provided for hereinafter, and the federal court on consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

Id. at 312. Beyond this, the Court in *Townsend* noted that even when one of the preceding criteria does not mandate a federal hearing, a federal district court still has discretion to hold a hearing. *Id.* at 318.

In the wake of *Townsend*, Congress enacted the former § 2254(d), which codified the preceding eight factors, and established a presumption in favor of state findings of historical fact, so long as the state court made written findings and the proceedings in which the findings were made met several tests for procedural regularity and substantive accuracy.

The Fourth Circuit has addressed when an evidentiary hearing is required. The court has concluded that a habeas petitioner is entitled to an evidentiary hearing in federal district court only if "(1) he alleges additional facts that, if true, would entitle him to relief; and (2) he is able to establish any of the six factors set out by the Court in *Townsend,* or the related factors set out in 28 U.S.C. § 2254(d)." *Poyner v. Murray,* 964 F.2d 1404, 1414 (4th Cir.), *cert. denied,* 506 U.S. 958 (1992) (citations omitted). The touchstone is that an evidentiary hearing must be held where the petitioner presents a colorable constitutional claim and the facts were not resolved in the state proceeding. *Washington v. Murray,* 952 F.2d 1472, 1476 (4th Cir. 1991). Where, as here, a state court evidentiary hearing was held and there is a reliable record of the proceeding, the factual determinations on the merits shall be presumed correct unless Petitioner meets his burden of showing by convincing evidence that the state findings are erroneous. Former 28 U.S.C. § 2254(d); *Moore v. Ballone,* 658 F.2d 218 (4th Cir. 1981). However, if the petitioner establishes any one of the criteria listed in 28 U.S.C. § 2254(d), the presumption of correctness disappears and the petitioner

is entitled to an evidentiary hearing. *Turner v. Bass,* 753 F.2d 342, 347 (4th Cir. 1985), *rev'd on other grounds,* 476 U.S. 28 (1986); *Vanater v. Boles,* 377 F.2d 898, 900 (4th Cir. 1967).

Petitioner has failed to satisfy the criteria warranting an evidentiary hearing. He has neither advanced additional facts entitling him to relief nor established the § 2254(d) criteria. In fact, he has failed to explain what other non-cumulative evidence he would or could offer at this juncture, even if an evidentiary hearing were held.

The court also finds no need for oral argument. Rule 56, Fed. R. Civ. P. and Habeas Corpus Rule 8(a) permit a district court, once the pleadings are filed and it decides an evidentiary hearing is unnecessary, "to make such disposition of the habeas petition as justice shall require." *Maynard v. Dixon,* 943 F.2d 407 (4th Cir. 1991). Rather than disposing of this case merely upon the pleadings and the record below, however, the court has invited and received ample subsequent motions briefing from both parties, which has enabled the court to resolve all issues in the petition.

(ii). Grounds 1, 2 and 3

As to his claims under Grounds 1, 2 and 3, Petitioner claims he is entitled to an evidentiary hearing because no state court has yet considered the merits of his challenge to the 1970 murder conviction, the sole aggravating circumstance supporting his death sentences.

Petitioner acknowledges that his separate state postconviction proceeding challenging the 1970 conviction was not commenced until 16 years after his conviction, but asserts that the delay was justified because he did not have an incentive to challenge the prior conviction until it was to be used as an aggravating circumstance to the 1985 killings. The state PCR court held a hearing on the 1970 murder, at which Petitioner testified. Petitioner asserted ineffectiveness of counsel at trial, and in counsel's failure to perfect his appeal. The state court had before it a copy of the transcript

of the 1970 proceedings. (App. 2646). The court also received a proffer by Petitioner as to the circumstances of Mr. Lesesne's representation. (State's Suppt'l Return, filed March 5, 1997, at 16-22.)

At the PCR hearing, Petitioner testified that Mr. Lesesne informed him that he would have to pay $1100 for Lesesne to handle the appeal. Petitioner further stated that his father was to have applied proceeds from the sale of Petitioner's automobile to the costs of appeal. However, Petitioner later deduced that his father had converted the money and failed to make the necessary payment. Petitioner testified his father assured him that the appeal was ongoing. Petitioner admitted that after his 1970 conviction he never attempted to contact Mr. Lesesne himself, directly in writing or by telephone. (State's Suppt'l Return, filed March 5, 1997, at 21). Petitioner testified he learned in 1978 the appeal had been abandoned.

After the hearing, Judge William J. McLeod dismissed the application based on laches because Petitioner "offered no significant justification for his sixteen year delay in filing for collateral relief." (App. 2649). The court also found specifically that the State "is clearly prejudiced by this delay since testimony that may refute Applicant's allegations is only available from his trial attorney and that attorney died on October 3, 1986, leaving no records or other admissible evidence to shed any light on Applicant's allegations." (App. 2649-50.)

Circumstances surrounding the validity of the 1970 murder conviction were also considered extensively in the 1988 resentencing proceeding before Judge Cottingham, in which Petitioner stipulated to the fact of the 1970 murder conviction. Petitioner claims that his ostensible purpose in the stipulation was to avoid having to call a records clerk to testify to Petitioner's record of conviction for the 1970 murder of his brother. As noted above, although Judge Cottingham correctly

did not allow Petitioner to attack the validity of the 1970 murder conviction as an aggravating circumstance, he did allow evidence regarding it to be considered by the jury as mitigating circumstances evidence. Petitioner's counsel read the 1970 transcript into the record at the later resentencing trial.

In the state postconviction proceedings following the 1988 resentencing trial, the circumstances of the 1970 murder were again treated at length. The extensive record of that state postconviction proceeding before Judge Bristow is contained in Vol. 6 of the App. 2873 to Vol. 10 of the App. 4620, including Supp. App. I at 231-401, and all of Supp. App. II. The court has closely examined the record of those proceedings. Petitioner testified at length concerning Mr. Lesesne's alleged ineffectiveness. (App. 2940-66). Petitioner also called Attorney Robert B. Wallace, the Solicitor in the 1970 murder conviction, to testify concerning Petitioner's aborted plea, and subsequent conviction for murder. (App. 3037-44.) Attorney Coming Gibbs also testified at length concerning his acquaintance with Mr. Lesesne, and his opinion concerning Mr. Lesesne's trial tactics. (App. 3149-67.)

Judge Bristow's order denying the PCR application, found at App. 4519 - 4588, addresses *both* the procedural laches defense to Petitioner's challenges to his 1970 conviction and the merits of the ineffectiveness claim. First, the court noted that "[i]t is improvident for this Court to review whether the earlier PCR [on the 1970 conviction] was properly denied under *laches* where the issue was denied certiorari [by the South Carolina Supreme Court on March 9, 1988] in the appeal from the denial of state post conviction." (App. 4558). Relying on language in the opinion from the direct appeal of Petitioner's 1988 resentencing proceeding to the effect that Petitioner's "resentencing trial was not the proper forum for collateral attack upon that [1970] conviction," *State v. Atkins,* 399

S.E.2d 760, 762 (S.C. 1990), Judge Bristow concluded Petitioner had already pursued an attack on the 1970 conviction by initiating the separate postconviction proceeding before Judge McLeod, and that Petitioner had been unsuccessful.

Importantly, however, Judge Bristow also found that even if he were to consider Petitioner's ineffectiveness claims on the merits, the claims would still be denied. The order stated:

> Applicant contends that, in 1970, he received ineffective assistance from now deceased lawyer, Thomas Lesesne, initially because he was unable to get a plea to voluntary manslaughter entered when the trial judge rejected the plea after Atkins described the incident to indicate that he acted in self-defense. As to this issue, I have found no case which has held that counsel was constitutionally ineffective when a client entered a not guilty plea and faced a jury trial rather than entering a negotiated plea to a lesser offense. Applicant's assertion does not meet the *Strickland* standard because the fact is that the trial judge rejected the plea offer and the Petitioner went to trial. Accepting this argument would suggest that any defendant convicted of a greater offense would be entitled to state post conviction relief where a less[er] plea offer was not accepted by either the trial court or the defendant. Here, the 1970 trial judge did not accept the plea for sound reasons. Counsel cannot be deemed constitutionally ineffective under the circumstances. For this reason, that allegation would lack merit.
>
> I do not find that the other instances complained of (failure adequately [to] prepare Applicant to testify, calling B.F. Atkins [Petitioner's father] as a witness; and not filing an appeal) amount to ineffective assistance of counsel, that is to say, I do not find that such performance is deficient, nor do I find that any deficient performance, if any, prejudiced the defense so as to deprive the Applicant of a fair trial.

(App. 4560-61.) The court is, of course, aware that Judge Bristow's finding of no ineffectiveness of counsel is a mixed question of law and fact and that, therefore, his ultimate conclusion has no binding effect on this court. *Strickland v. Washington,* 466 U.S. 668 (1984); *Becton v. Barnett,* 920 F.2d 1190, 1192 (4th Cir. 1990). However, underlying factual findings made in the course of resolving the ineffectiveness claim are entitled to the presumption of correctness. *Id.*

Even if the court were inclined to grant an evidentiary hearing on the claims challenging the

1970 conviction, the court is hard pressed to divine what additional relevant and material evidence could be gleaned at this late date. As noted, the principal actor in the ineffectiveness claim, Mr. Lesesne, is long deceased and no surviving records exist as to Petitioner's claim. The only other material actor, Petitioner's father, who apparently acted as Petitioner's agent in communicating with Mr. Lesesne regarding the unperfected appeal, was killed by Petitioner in 1985. Although Petitioner testified in his belated postconviction proceeding before Judge McLeod that after his incarceration his father converted proceeds from the sale of his automobile for his own use (rather than paying Mr. Lesesne for the costs of the appeal), all this tends to show is that his deceased father was of less than honest character. It does not necessarily prove ineffectiveness of Mr. Lesesne. Petitioner admitted that he never personally attempted to contact Mr. Lesesne to find out the status of his appeal, even when he was released on parole from the 1970 murder conviction in 1980. Petitioner has failed to identify any other individual who has knowledge of the 1970 conviction and who has not already testified in the prior proceedings.

The full record of the aborted 1970 plea and the ensuing trial, contained in Suppt'l App. I at 1-229, reflects that Petitioner was reluctant to abandon his self-defense claim. That is, indeed, the precise reason Judge Singletary refused to accept his plea to voluntary manslaughter, because, as he advised Petitioner, a finding of self-defense would be a complete defense to the murder charge and would absolve him of all responsibility. At the 1970 trial Petitioner testified at length concerning the violent altercation he had with his brother preceding the fatal shooting, (Suppt'l App. I at 127-29) and that later, when he confronted his brother and asked him why he had hit him, his brother responded in the following fashion:

He just reached back in his left pocket. He had his hands on his hips and he reached

> back in his left pocket, and I seen the butt of the thirty-two pistol that I knew he had come out.
>
> The gun--he had it in his hand, and he has already stabbed me so I seen the gun in his hand and I knew he wasn't going to try to hit me with it, so I did throw up the weapon and fire but only once. You know, I fired once.

(Suppt'l App. I at 129-30). It is apparent from the record that Petitioner wished to pursue his self-defense claim, and that he presented evidence of it at trial. The mere fact that Petitioner gambled and lost does not equate to a finding of ineffectiveness on the part of Mr. Lesesne.

Accordingly, based on the complete record before the court, the court finds that Petitioner has failed to adduce convincing evidence that his state PCR proceedings suffered from one of the defects contained in (former) § 2254, or that the state court's findings of dilatoriness on Petitioner's part, and prejudice to the State, are not entitled to a presumption of correctness. Moreover, Petitioner has been unable to articulate what additional relevant and material evidence is available at this date to support the merits of his ineffectiveness claim. The court concludes that a federal evidentiary hearing on Grounds 1, 2 and 3 would simply retrace evidence already available in the record and would not advance the disposition of the claims. Therefore, the court finds that an evidentiary hearing is not required and the court declines to exercise its discretion to hold one.

(iii). Ground 9

Petitioner claims an evidentiary hearing is required on his claim arising out of Juror Geraldine Heyward's references, during deliberations, to Biblical passages. At the state postconviction hearing before Judge Bristow, Petitioner called several employees of the South Carolina Death Penalty Resource Center [predecessor to the Post Conviction Defender Organization], defense counsel Kathryn Andrews from the 1988 resentencing, and four jurors to

support his claim of alleged extraneous influence on the jury, or juror misconduct. Judge Bristow sustained the State's objections to the testimony of the employees on the grounds of hearsay, and to the testimony of the jurors on the grounds that it was an attempt to impeach the jury's verdict under *Barsh v. Chrysler Corp.,* 203 S.E.2d 107 (S.C. 1974); and *State v. Thomas,* 234 S.E.2d 16 (S.C. 1977). However, pursuant to Rule 43(c), SCRCP, the postconviction judge allowed a full proffer to be made. Moreover, the postconviction judge's order specifically detailed his reasons for finding the testimony inadmissible and, alternatively, why even if the testimony was admissible it did not establish juror misconduct. (App. 4533-41.)

Juror Boese testified that the Christian Bible was quoted during the deliberations, but that he did not recall seeing either the Bible or handwritten notes from it in the jury room. He recalled a quote about "the blood crying from the ground." Juror Anne Dudley's proffer echoed Mr. Boese's testimony. Juror Humbert testified that the Bible had not been read during deliberations, but that it had been quoted. Juror Heyward testified she had reviewed the jury's deliberations after court that day and that she had referred to the Gideon Bible in her hotel room. She testified that the biblical references were ones she already knew from memory. She looked them up to find chapter and verse references, but not to make up her mind. She jotted the references down on notes and referred to them during the next day's deliberations.

Even if this court were to conclude that Judge Bristow's application of a state evidentiary rule prohibiting the impeachment of the jury's verdict impeded the "integrity of the fact finding process," *Chambers v. Mississippi,* 410 U.S. 284, 295 (1973), as Petitioner contends, Petitioner has again failed to demonstrate that the extensive record gathered in the state postconviction hearing on this

issue is deficient under one of the statutory grounds contained in § 2254(d).[5] Petitioner has not isolated what material and relevant evidence is available at this stage that was not adduced earlier. Moreover, the prior testimony is not in conflict. Accordingly, after reviewing all evidence pertinent to this claim, including the proffered evidence, the court concludes that the material facts were adequately developed at the state court hearing and provide a sufficient basis for the court to examine this claim.

(iv). Ground 4

Ground 4 challenges counsel's failure to pursue a guilty but mentally ill "GBMI" verdict at the first trial. Petitioner contends that the state postconviction court's fact finding as to this issue is fatally flawed.[6] He asserts that the state court merely adopted the proposed findings submitted by the State and that the findings do not represent independent findings of a judicial tribunal.

As to Ground 4, the state postconviction judge extensively addressed this claim in his order. (App. 4564-69.) In finding that Petitioner failed to present evidence showing either "deficient performance" or "prejudice" of 1986 trial counsel in failing to pursue a GBMI verdict, the court credited trial counsel's testimony that after consulting several doctors, "there were no mental defenses available to him," and that a diagnosis of post-traumatic stress syndrome had been discounted by Dr. Crane. (App. 4565.) Similarly, co-counsel agreed a GBMI verdict had not been

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[5]In Ground 9 *supra*, the court concludes that South Carolina law permits the introduction of testimony from the four jurors concerning possible extraneous influence. *See State v. Hunter*, 463 S.E.2d 314, 316 n.1 (S.C. 1995). However, even after considering the testimony of the four jurors, the court finds that Petitioner's claim is without merit for the reasons discussed in full below.

[6]Petitioner also claims this same deficiency infects the postconviction judge's finding as to Ground 10, failure to present evidence of tragic background and post-traumatic stress syndrome, discussed below.

possible here because it was unsupported by the consulting professionals. However, Petitioner points to an affidavit of Dr. Crane, contained in Petitioner's Motion to Expand the Record, to show that Dr. Crane was never asked by counsel if Petitioner could conform his behavior to the requirements of the law, or to consider a GBMI defense specifically.

It is true that Dr. Crane's September 9, 1992, affidavit, which was prepared weeks after the postconviction hearing on August 16-17, 1992, states that counsel Kent had requested an evaluation of Petitioner for substance abuse problems. Although Crane contends he was never asked in 1986 to make a determination whether Petitioner met the GBMI criteria, he states that because of Petitioner's alcohol dependence at the time of the offense, and because of results of medical tests done on Petitioner showing a neurological abnormality, he now concludes that Petitioner met the criteria for a GBMI verdict.

However, it is untrue, as Petitioner contends, that Judge Bristow's order failed to address the Crane affidavit. The order notes that Petitioner's sole evidence supporting his proposition that he fit the GBMI profile is contained in:

> [a]n affidavit of Dr. Doug Crane presented after the hearing and deposition which was not subject to cross-examination that he now has an opinion that he would qualify for GBMI solely upon Mr. Atkins' alcoholism and intoxication and that he had not been asked in 1986 about it.

(App. 4569.) The state PCR judge chose not to credit Dr. Crane's opinion, and credited the testimony of defense psychologist Dr. McKee, who testified that Petitioner did not meet the criteria of either GBMI or insanity. The state court relied on the existence of conflicting evidence on whether Petitioner met the GBMI verdict in concluding that Petitioner did not carry his burden of showing prejudice from counsel's alleged failure to pursue a GBMI verdict by a preponderance of

the evidence.

None of Petitioner's challenges to the state court's findings as to Ground 4 demonstrate a deficiency in the criteria enumerated in (former) § 2254(d). The mere fact that counsel for one side prepared a proposed draft of an order eventually adopted by the postconviction court does not *per se* establish abdication of duty by the postconviction court. See *Maynard v. Dixon,* 943 F.2d 407, 416 n.6 (4th Cir. 1991) ("findings of fact may be adopted from proposed findings of fact submitted by one of the parties where, as here, the state habeas court conducts a thorough and independent review of the proposed findings."). Here, the state habeas court appropriately weighed the conflicting evidence on the GBMI issue, and concluded that Petitioner could not prove he had been prejudiced from any asserted ineffectiveness of counsel to pursue a GBMI verdict.

After considering the complete record, the court is convinced that an adequate record exists upon which the court can resolve Petitioner's Ground 4. Because Petitioner has not adduced convincing evidence of a § 2254(d) deficiency in the fact finding as to Ground 4, Petitioner is not entitled to an evidentiary hearing on this issue. Again, as noted above, because the question of ineffectiveness is a mixed question of fact and law the court accords no presumption of correctness to the state court's determination on that issue.

(v). Ground 10

Ground 10 challenges resentencing counsels' alleged failure to develop and present available mitigating evidence that Petitioner suffered from post-traumatic stress disorder, and not an antisocial personality disorder. As to Petitioner's demand for an evidentiary hearing on Ground 10, alleging failure to develop mitigating evidence through a social worker of his sad personal life and evidence of post-traumatic stress disorder, the state PCR judge thoroughly analyzed this claim at App. 4541-

57. The PCR judge canvassed the evidence adduced at the resentencing proceeding concerning Petitioner's background. The court noted that evidence concerning Petitioner's brother's stabbing attack on him in 1966, his troubled school background, his 1961 break in at a church, his unhappy childhood with beatings from his father leading to his running away from home, and his problems after returning from Vietnam were all before the 1988 resentencing jury. (App. 4551-54). The court also noted that at the resentencing trial psychologist Dr. Cogar gave an opinion that Petitioner suffered from "an alcohol dependence, an anti-social personality disorder, and symptoms of post traumatic stress disorder," (App. 4554), and that psychiatrist Dr. Malcolm testified that Petitioner suffered from "alcoholism" and an "anti-social personality disorder." (App. 4555).

However, in postconviction proceedings Petitioner claimed that the 1988 resentencing counsel was ineffective in failing to demonstrate to the sentencing jury that:

> 1. Petitioner does not have an anti-social personality disorder;
>
> 2. Petitioner is the product of a remarkably tortured childhood. His behavior as a child and adolescent is the natural and understandable consequence of this upbringing, and not indications of a budding sociopathy;
>
> 3. Petitioner is a casualty of the war in Southeast Asia, participating in numerous fire-fights on behalf of his country, and also witnessing time and again the riveting visions of war;
>
> 4. Petitioner, no more and no less than any of us, is a product of his past. He is brain damaged, he is an alcoholic, and he suffers from post-traumatic stress disorder.

(App. 4550.)

In support of Ground 10's challenge of ineffectiveness, Petitioner submitted to Judge Bristow the deposition of social worker Louisa Storen taken after the postconviction relief hearing, and the deposition of defense psychologist Dr. Cogar (App. 3216), who testified in the 1988 resentencing

proceeding. Petitioner also submitted the deposition of Dr. McKee (App. 3261), who first examined Petitioner in 1992 at the request of the Death Penalty Resource Center. Petitioner also relied on a 1992 affidavit of defense psychiatrist Dr. Malcolm (Att. to Petitioner's Motion to Expand the Record), who also testified at the 1988 resentencing proceeding. Ms. Storen's evaluation concerned Petitioner's tragic home life, post-traumatic stress disorder and alleged brain damage. The deposition of Dr. Cogar and the affidavit of Dr. Malcolm were both submitted in an attempt to demonstrate that had those experts been sufficiently apprised of all the material facts concerning Petitioner's background, their opinions whether Petitioner suffered antisocial personality disorder might well have been different. Dr. McKee's ten hour evaluation of Petitioner conducted in 1992 culminated in the opinion that "he does and did at the time of the alleged offense suffer from post-traumatic stress disorder, chronic type. That is based on my interviews with him, based as well in particular on statements made by Linda Walters, who was his woman friend for a number of years, her recollections of his activities around that time." (App. 3270.)

After considering the 1988 resentencing testimony on Petitioner's background and comparing it to the postconviction evidence provided by social worker Ms. Storen, the court concluded that substantially similar evidence had been introduced at both proceedings. The court stated:

> Clearly, the jury received a strikingly similar picture of Joe Atkins in 1988. Counsel investigated the areas of alcohol use, his Vietnam experience, and his family background. Contrary to the implied assertion, there is no *per se* constitutional duty to present a social worker to describe mitigating evidence involved in a family in a capital case.

(App. 4557.) As to counsel's assertion that 1988 resentencing counsel had been ineffective in failing to extract uncomplicated diagnoses of post-traumatic stress syndrome from Drs. Cogar and Malcolm, the court found no ineffectiveness:

> The problem with current counsel's approach is that each expert was able to render a professional opinion. It has been held that a counsel is not expected to "expert shop" until he finds a psychiatrist or other expert who will give the defendant certain mitigating evidence. *Fitzgerald v. Thompson,* 943 F.2d 463 (4th Cir. 1991); *Poyner v. Murray,* 964 F.2d 1404 (4th Cir. 1992). Here, counsel cannot be deemed unreasonable because some of the experts have revised their diagnosis since the trial.

(App. 4556.) The court went on to conclude that no prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984), had been demonstrated even though the postconviction evidence was more favorable to Atkins. The court noted that Dr. McKee candidly acknowledged in 1992 that another clinician could well have developed "anti-social personality disorder" as a diagnosis for Petitioner. (App. 4568). Thus, the court found that the weight of the testimony was not such as to undermine confidence in the jury's death verdicts because testimony quite similar to it had already been submitted to the jury.

After examining the complete record in this matter, the court finds that Petitioner has not demonstrated convincing evidence of a § 2254(d) deficiency in the state court's review such as to warrant an evidentiary hearing. As noted above, the court will not accord any presumption of correctness to the state postconviction court's ultimate finding as to ineffectiveness of counsel because that is a mixed question of law and fact. However, the court concludes that an adequate and reliable record has already been compiled from which this court can undertake an appropriate review and that an evidentiary hearing would only produce cumulative evidence on this question.

(vi). State's Procedural Defenses

In the State's Motion for Summary Judgment, discussed *infra* at Section VI, the State argues, in part, that all or portions of Petitioner's Grounds for Relief Numbers 1, 2, 3, 4, 7, and 22 are subject to procedural defenses. After reviewing Petitioner's initial response to the State's motion, and the

Petitioner's own Motion for an Evidentiary Hearing requesting a hearing on the procedural defenses, the court found that Petitioner had not adequately responded as to all the alleged procedural defenses. Accordingly, by order of April 14, 1997, the court directed Petitioner to supplement the record by filing a complete response to the procedural defenses. The April 14, 1997, order cautioned that "cited claims to which no procedural defense response [by Petitioner] is made will be deemed conceded by Petitioner."

Thereafter, on April 16, 1997, Petitioner filed a "Motion for Clarification of Court's April 14, 1997, Order," in which he identified and expanded on his responses to certain procedural defenses, and confirmed that he was abandoning Grounds 6, 8, 14, and 23 of the Petition. The State filed its Reply to Petitioner's Motion for Clarification on April 29, 1997. Thereafter, on May 8, 1997, Petitioner filed his Reply to the State's Reply, which contained additional arguments against the procedural defenses and in support of the need for an evidentiary hearing.

The court finds that Petitioner's Motion for Clarification and the subsequent briefing by the parties has adequately expanded the record on the procedural defenses, so that the court's order of April 14, 1997, has been satisfied. The court concludes that a meaningful and adequate record now exists as to the procedural defenses, and that an evidentiary hearing is unnecessary on what are largely legal conclusions drawn from a record of the state procedural history. Accordingly, the court does not find that an evidentiary hearing on procedural defenses would advance the disposition of this claim. The court finds that Petitioner's April 16, 1997, Motion for Clarification of Court's April 14, 1997, Order, is therefore MOOT.

VI. STATE'S MOTION FOR SUMMARY JUDGMENT

Petitioner asserts 19 remaining grounds for habeas corpus relief. These issues will be

addressed seriatim.[7] Before considering those separate claims, however, the court provides a condensed summary of the material issues. It is important to note that the Petition combines two distinct habeas corpus challenges. Grounds 1, 2 and 3 directly attack the validity of the 1970 conviction. The remaining grounds challenge the outcome of the 1986 and 1988 proceedings. Some of the claims involving the 1988 resentencing are related to issues concerning the 1970 conviction, which served as the sole aggravating circumstance for Petitioner's death sentences. For example, in Grounds 12 and 13 Petitioner claims his constitutional rights were violated by the resentencing court's refusal to review the validity of the 1970 conviction. Because Petitioner's Grounds 1, 2 and 3 can be considered separate and apart from the remaining grounds, if Petitioner prevails on those grounds his 1970 conviction would be set aside, and his two death sentences necessarily vacated because Petitioner would be "actually innocent" of the death penalty. Thus, it is unnecessary for Petitioner to prevail on the 1986 and 1988 claims in order to have his death sentences vacated.

As to Petitioner's challenge under Grounds 12 and 13, the court has determined that the 1988 resentencing court was not required to review the validity of the 1970 conviction because Petitioner did not claim an uncounseled conviction under *United States v. Tucker*, 404 U.S. 443 (1972). Additionally, Petitioner challenges in Ground 3 certain jury instructions given in the 1970 trial, which were not objected to at trial, and which years later were abandoned by the courts. Petitioner is procedurally barred from asserting those challenges. On the merits, the malice instruction used is undoubtedly afoul of *Sandstrom v. Montana*, 442 U.S. 510 (1979), but its usage was harmless beyond a reasonable doubt in light of the other evidence that Petitioner's killing of his brother in

[7]For ease of reference this order uses the number designations assigned to the grounds in the Petition. Thus, ground numbers 6, 8, 14 and 23 are not discussed below because they were abandoned by Petitioner.

1970 was accompanied by malice. As to the self-defense charge, the instruction satisfied the test of *Martin v. Ohio*, 480, U.S. 228 (1987).

Finally, the court has undertaken a merits assessment of Petitioner's numerous claims regarding ineffectiveness of 1970 counsel under Grounds 1 and 2. The court finds no basis for concluding 1970 counsel rendered deficient performance that prejudiced Petitioner under *Strickland v. Washington*, 466 U.S. 668 (1984).

A. Ground 1:
Petitioner's 1970 murder conviction was obtained in violation of his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

(i). General

Ground 1, as well as grounds 2 and 3, all allege infirmities in Petitioner's 1970 conviction for murdering his brother. As a threshold matter the State interposes several procedural defenses to these three grounds. The court finds that these defenses are meritorious, as explained below, and that grounds 1, 2 and 3 are procedurally barred from federal habeas review. However, to facilitate further appellate review in this case, the court also considers the merits of the unexhausted claims. That is because the court has concluded that if Petitioner should prevail on any claim challenging the 1970 conviction, Petitioner's death sentences would be invalidated because the 1970 murder conviction was the sole aggravating circumstance in Petitioner's sentencing trial.

In *Johnson v. Mississippi,* 486 U.S. 578 (1988), the Court found the denial of federal habeas relief from a death sentence based, in part, on a felony conviction that was later vacated to be cruel and unusual punishment prohibited by the Eighth Amendment. The Court reasoned that a jury's consideration of a felony conviction, that was later invalidated, as an aggravating circumstance

supporting imposition of the death penalty was clearly prejudicial. The invalidated felony conviction could not serve as an aggravating factor for the death penalty even though the defendant had actually served a sentence for the conviction. Here, if Petitioner's 1970 conviction is invalid, there would be no aggravating circumstance to support the death penalty. *Sawyer v. Whitley,* 505 U.S. 333 (1992).

(ii). Ineffectiveness from collapse of plea to voluntary manslaughter

Ground 1 of the Petition asserts that the 1970 conviction was obtained in violation of the Sixth Amendment because: (1) trial counsel, Mr. Lesesne, never perfected the appeal; (2) trial counsel failed to properly prepare and defend the case; and (3) trial counsel allowed the proffered plea to voluntary manslaughter to collapse, thus requiring Petitioner to go to trial on the murder charge. Of the three preceding claims, the only issues exhausted as a direct challenge to the 1970 murder conviction are the claims relating to the alleged failure to perfect the appeal and trial ineffectiveness. These claims were raised before Judge McLeod in the state postconviction proceeding initiated in 1986 challenging the 1970 conviction. There, Judge McLeod found that laches barred the state court's consideration of the claims on the merits. The state supreme court subsequently denied a writ of certiorari from this ruling in a letter order dated March 9, 1988.

In Petitioner's 1991 state PCR action challenging the 1986 guilt phase and 1988 resentencing proceedings, Petitioner also asserted ineffectiveness claims of lack of adequate trial preparation and collapse of the manslaughter plea. Judge Bristow, relying on Judge McLeod's earlier dismissal of Petitioner's challenge to the 1970 conviction on the basis of laches, found that Petitioner's ineffectiveness claims based on the 1970 conviction were not properly at issue in the 1991

proceeding.[8] Thus, the merits of the claim of collapse of the plea have never been considered in any state court forum.

Petitioner never attempted to commence a separate "successive" state postconviction proceeding concerning the collapse of plea. South Carolina has a successive petition bar. S.C. Code Ann. § 17-27-90. Under this rule, Petitioner should have raised this ground as part of his 1986 postconviction proceeding directly challenging the 1970 conviction. A failure to raise a claim in the first state postconviction petition as required by state law provides an adequate state procedural ground for denying federal habeas corpus relief. *Murch v. Mottram,* 409 U.S. 41 (1972). Petitioner has failed to demonstrate cause and prejudice to excuse the default. Accordingly, the court finds that Petitioner's challenge based on collapse of the 1970 plea is procedurally barred from consideration in this court because of the successive bar doctrine.[9] Even if the claim were not barred, the court concludes it lacks merit.[10] Thus, the only part of Ground 1 considered further will be those portions of the claim that assert ineffective assistance of counsel based on Mr. Lesesne's trial deficiencies and failure to perfect the appeal from the 1970 conviction.

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[8]Judge Bristow ruled, in the alternative, that these claims had no merit. The procedural bar rule nevertheless applies here, regardless of whether the court has alternatively considered the merits, as long as the court explicitly invoked the state procedural rule as a separate basis for decision. *Harris v. Reed,* 489 U.S. 255, 264 n.10 (1989).

[9]The additional ineffectiveness issues were not exhausted under the "same claim" requirements of *Picard v. Connor,* 404 U.S. 270, 275-76 (1971).

[10]It is clear from the transcript of the aborted plea that Judge Singletary correctly refused to accept the plea to involuntary manslaughter when Petitioner's rendition of the events so markedly asserted a self-defense claim. Petitioner proceeded to trial and introduced facts that could have, if believed by the jury, resulted in a finding of self-defense. *See* Ground 1, *infra*, regarding Petitioner's self-defense theory. Simply because Petitioner's theory did not prevail before the jury does not establish ineffectiveness of Mr. Lesesne.

(iii). State Court's Application of Laches as Procedural Bar to Federal Habeas Review

In the 1986 state postconviction proceeding before Judge McLeod, Petitioner claimed ineffective assistance of counsel because of counsel's alleged deficiencies at trial and in perfecting the appeal. Prior to the hearing, however, 1970 trial counsel died. The State moved to have the PCR application dismissed on the basis of Petitioner's laches in processing the by-then 17-year old claim. The State asserted prejudice based on the deaths of Mr. Lesesne and Petitioner's father. After a hearing at which Petitioner testified his father had converted his money and failed to supply the funds for the processing of the appeal, Judge McLeod found laches barred both ineffectiveness claims. Petitioner testified he first realized the 1970 conviction had not been appealed in 1978. (App. 2947). The court specifically found as a fact that the State had suffered prejudice and that Petitioner had no just cause or excuse for the delay. In a letter ruling, the Supreme Court of South Carolina denied the writ of certiorari from Judge McLeod's denial of the PCR application.

Based on the above, the court finds that the state court's application of the laches doctrine serves as an independent and adequate state procedural bar to federal habeas corpus review. Where the petitioner fails to comply with a state procedural rule, and that failure provides an adequate and independent ground for the state's denial of relief, federal review will also be barred if the state court has expressly relied on the procedural default, absent a showing of cause and prejudice, or actual innocence. *Harris v. Reed,* 489 U.S. 255 (1989). Adequacy requires only application of the rule evenhandedly to all similar claims. *Hathorn v. Lovorn,* 457 U.S. 255, 263 (1982). To invoke the procedural bar, there must be consistent or regular application of the state's procedural default rule. *Meadows v. Legursky,* 904 F.2d 903, 907 (4th Cir.) (*en banc), cert. denied,* 498 U.S. 986 (1990).

Petitioner contends the equitable doctrine of laches cannot serve as a procedural bar because of the discretionary nature of its application. However, "consistent or regular application of a state's procedural default rules does not mean undeviating adherence to such rule admitting of no exception." *Meadows,* 904 F.2d at 907. In *Wedra v. Lefevre,* 988 F.2d 334, 339 (2d Cir. 1993), the court found that the petitioner's failure to timely seek leave to appeal served as a procedural bar, notwithstanding that the procedural default rule was discretionary in its application.

The court has studied South Carolina postconviction relief law and concludes that South Carolina courts consistently and regularly apply the laches doctrine to claims such as Petitioner's, initiated 16 years after his conviction. For example, in *McElrath v. State,* 277 S.E.2d 890 (S.C. 1981), the court found that laches barred an application for postconviction relief 20 years after the conviction date, in the absence of reasonable diligence or an acceptable justification for the delay. There, a defendant convicted in 1959 attempted to file his PCR application on the grounds his conviction was invalid because he had been indigent and unrepresented by counsel. Concurring with the trial court's application of laches, the state supreme court cited with approval two federal habeas cases, *Johnson v. Riddle,* 562 F.2d 312 (4th Cir. 1977) (17-year delay too long for habeas corpus application in absence of explanation or justification for delay) and *Honeycutt v. Ward,* 612 F.2d 36 (2d Cir. 1979) (15 year delay too long to permit habeas corpus review).

Here the state supreme court denied Petitioner's petition for writ of certiorari from Judge McLeod's dismissal on the basis of laches. A denial of certiorari is not a judgment, but is simply a refusal to hear an appeal; therefore, the federal court must examine the lower state court judgment for the existence of a plain statement of the procedural default rule. *Ylst v. Nunnemaker,* 501 U.S.

797 (1991). In the present case, Judge McLeod's reasoned opinion rested solely on the procedural ground of laches.

As purported justification for the delay, Petitioner explains that there was no motivation or compelling need to challenge his 1970 conviction until it was used as an aggravating circumstance in the 1986 trial. The court rejects this a sufficient reason for the delay. By Petitioner's own admission he knew in 1978 that the appeal had not been processed. He should have initiated his challenge then. Had he done so, an adequate record could have been developed because the attorney, Mr. Lesesne, would have still been alive and able to testify and provide records for review. In addition, Petitioner's father could have been called to testify as to his role as intermediary in dealing with the attorney on the appeal.

Based on the foregoing reasons, the court finds that the state court's dismissal of ground 1 on the basis of laches serves as a procedural bar to this court's consideration of any part of ground 1.

(iv). Delayed Petition Rule 9(a)

Habeas Corpus Rule 9(a) provides that:

> A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

See also Vasquez v. Hillery, 474 U.S. 254 (1986) (Rule 9(a) (permits the state to move for a dismissal based on prejudice to its ability to respond to the petition, not based on prejudice to ability to obtain second conviction should relief be granted). Instead of filing his 28 U.S.C. § 2254 petition based on the 1970 conviction after the state supreme court's denial of certiorari on March 9, 1988,

Petitioner waited until January 15, 1997, to commence the instant challenges to his 1970 conviction under Grounds 1, 2 and 3. As a separate and independent procedural bar to Petitioner's challenges to the 1970 conviction, the court concludes that Rule 9(a) proscribes federal habeas review of Petitioner's claims.

To invoke Rule 9(a), the state must make a particularized showing of prejudice. *Alexander v. Maryland,* 719 F.2d 1241, 1246 (4th Cir. 1983). The district court should give the petitioner an opportunity to rebut the showing of prejudice or show prejudice was unavoidable, and make a finding of prejudice before dismissing the petition. *Davis v. Adult Parole Auth.,* 610 F.2d 410 (6th Cir. 1979).

Judge McLeod's findings of prejudice to the State and lack of just excuse by Petitioner are entitled to the presumption of correctness under (former) 28 U.S.C. § 2254(d). Moreover, even if they were not, the Advisory Notes to Rule 9(a) provide that "if the delay is more than five years after the judgment of conviction, prejudice is presumed, although this presumption is rebuttable by the petitioner." Despite submitting expanded briefing on the procedural defense issues by order of April 14, 1997, Petitioner has failed to rebut the presumption of prejudice applied under Rule 9(a) to his 1970 conviction claims, which are filed 27 years after the conviction, and nine years after the state appellate court's denial of postconviction relief. The Fourth Circuit has held that Rule 9(a) applies the equitable doctrine of laches rather than a statute of limitations, and is to be liberally construed. *Alexander v. Maryland,* 719 F.2d 1241, 1245-46 (4th Cir. 1983). In *Johnson v. Riddle,* 562 F.2d 312 (4th Cir. 1977), the court found that a 17-year delay (from date of conviction) in raising an ineffectiveness claim justified dismissal under Rule 9(a). Following *Johnson,* the court in *Silva v. Zahradnick,* 445 F.Supp. 331 (E.D. Va. 1978), applied the laches rule of Rule 9(a) to a 21-year

old (from date of conviction) ineffectiveness claim where trial counsel had passed away and no records could be obtained.

Similarly, the court in *Honeycutt v. Ward,* 612 F.2d 36 (2d Cir. 1979), found a 15-year delay (from date of conviction) justified dismissal under Rule 9(a). The court noted that:

> While it is important that one convicted of a crime in violation of constitutional principles should be accorded relief, it is also important that reasonable diligence be required in order that litigation may one day be at an end. Rule 9(a) guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, whose records and witnesses are no longer available.

Id. at 42.

Based on the preceding authorities, the court concludes that Petitioner's Grounds 1, 2 and 3, all based on his 1970 conviction, are barred by Rule 9(a). It is inconsistent with Rule 9(a) to command the State to defend the integrity of a 1970 conviction at this delayed date, given the demonstrated prejudice, and the fact that Petitioner failed to commence this now 27-year old claim until 1997.

(v). Merits of Ineffectiveness Challenge Based on Failure to Perfect Appeal

The United States Supreme Court has recognized, however, that in cases of apparently genuine, fundamental injustice, a decision on the merits is appropriate without regard to the state law procedural default. In the context of a capital sentencing, a defendant who can show that he is probably "innocent" of the death penalty may be excused from the state procedural default. *Sawyer v. Whitley,* 505 U.S. 333 (1992). To the extent that Petitioner claims he is "actually innocent" of the death penalty because of the invalidity of the 1970 conviction, this court will also consider Petitioner's claims on the merits. The court finds Ground 1(failure to perfect the appeal and trial

deficiencies) without merit. A failure to perfect an appeal as of right gives rise to an ineffective assistance claim. *Evitts v. Lucey,* 469 U.S. 387 (1985). An appeal from a criminal conviction is a matter of right. *Coppedge v. United States, 369 U.S. 438* (1962). This rule applies irrespective of whether counsel is retained or appointed. *Evitts*, 469 U.S. 385. Because counsel's failure to appeal forfeits a defendant's ability to protect his vital interests at stake, a failure to pursue a requested appeal raises a colorable claim of ineffectiveness regardless of whether defendant would have prevailed on appeal. *Becton v. Barnett,* 920 F.2d 1190, 1195 (4th Cir. 1990). It is ineffective assistance of counsel when retained counsel knows that the defendant wishes to appeal and is indigent, and does not inform him of his right to court-appointed counsel. *Williams v. Corner,* 392 F.2d 210, 213 (4th Cir. 1968).

In applying the preceding law to the current record, however, a fundamental flaw is present: the record is composed solely of Petitioner's rendition of the facts surrounding the unperfected appeal from the 1970 conviction. Because of trial counsel's death and Petitioner's father's death, it is impossible for the whole picture regarding the 1970 appeal to ever be revealed. The court above found this claim barred on numerous procedural grounds. However, if a reviewing court rejects this court's conclusions as to the procedural defenses, then it appears, based on Petitioner's uncontradicted account of events relating to the appeal, that Petitioner states a colorable claim.

Of course we do not, and cannot, know the answers to the following relevant questions: whether Petitioner, by conduct or word, ever knowingly waived his right to appeal; whether Mr. Lesesne ever knew of Petitioner's alleged indigency status; whether Mr. Lesesne ever agreed to represent Petitioner on appeal or was retained solely through trial and the filing of the notice of appeal; whether, if Mr. Lesesne agreed to act as appellate counsel, he was ever granted permission

to be relieved; whether, if Mr. Lesesne knew of Petitioner's indigent status, he ever informed him, or his duly authorized agent, Benjamin Atkins, of the right to seek court-appointed counsel.

The court has reviewed the transcript of the PCR proceedings before Judge McLeod (State's Supplemental Return, filed March 5, 1997) and Judge Bristow. In both proceedings Petitioner testified concerning the unperfected appeal. On direct examination Petitioner testified he requested that Mr. Lesesne file an appeal of the 1970 conviction. (App. 2944). He stated he attempted to raise money for the appeal by the sale of his automobile. (*Id.)* He stated that he never gave up his right to appeal, and that he was advised that an appeal had been filed. (*Id.).* He also admitted, however, that Mr. Lesesne had told him he would need to pay him $1100 to continue the appeal. It is unclear from the record whether Mr. Lesesne's agreement to represent Petitioner on the appeal was contingent on his being advanced his fee at the beginning.

In *Lockhart v. Fretwell,* 506 U.S. 364 (1993), the Supreme Court emphasized that claims of ineffective assistance necessarily turn on the fundamental question whether the deficient performance renders the trial unreliable or the proceeding unfair. In the present context, that question means: assuming *arguendo* that Mr. Lesesne rendered deficient performance in failing to perfect the appeal, did that failure render Petitioner's 1970 murder conviction unreliable? If this court's conclusions as to the procedural bar are rejected, and Mr. Lesesne's failure to perfect the appeal is deemed ineffective assistance so that Petitioner's 1970 conviction is invalidated, then Petitioner's death sentences would also be invalid because his 1970 conviction was the sole aggravating factor at the 1986 trial.

The only way in which this court can determine whether Mr. Lesesne's alleged ineffectiveness on appeal rendered the trial result unreliable within the meaning of *Fretwell* is to

examine the transcript of the 1970 trial; determine what issues Petitioner could have advanced on appeal; and assess whether any of those grounds would have been successful based on the law then in existence. In at least one case, *Winslow v. Murray,* 836 F.2d 548, 1987 WL 30257 (4th Cir. 1987) (unpublished), a Fourth Circuit panel pursued a similar approach with an alleged failure to perfect an appeal. Because the court found no successful grounds for appeal, the court denied the claim of ineffectiveness.

Judge Singletary, the trial judge in the 1970 prosecution, charged the jury on murder, voluntary manslaughter, and the defenses of insanity and self-defense. Based on the court's independent examination of the transcript of the 1970 trial, including the motions and jury instructions, the court finds only two significant issues that would have been preserved for appeal: (1) the sufficiency of the evidence supporting the murder conviction; and (2) the trial judge's refusal to give an instruction that if portions of the testimony were subject to two inferences, one of innocence and one of guilt, the jury must give the testimony the inference of innocence.

As to (1), the law in South Carolina at the time of Petitioner's trial was and still is, that murder is the killing with malice aforethought, express or implied. *State v. Gandy,* 324 S.E.2d 65 (S.C. 1984). Malice excludes just cause, and is a heart "fatally bent on mischief." Voluntary manslaughter is the wrongful taking of the life of another intentionally, without malice, in sudden heat and passion and upon sufficient legal provocation. In the present case, there was no dispute that Petitioner had killed his brother. So, the only real question before the jury was whether that killing was murder or voluntary manslaughter, assuming that it rejected Petitioner's defenses of insanity and self-defense. The court concludes substantial evidence of Petitioner's malice was introduced to sustain the murder conviction. Mr. Simpson, at whose home the fatal shooting occurred, testified that

Petitioner left the Simpson residence, drove at least eight miles round trip to his father's house to retrieve a shotgun, came back to Mr. Simpson's house and burst threw the door, pushing Mr. Simpson into a collection of bottles. Simpson further testified that Petitioner raced up the steps and began shooting immediately when he got to the top of the steps. Most significant, Mr. Simpson described how Petitioner, after shooting his brother three times, left the house and began shooting out the front windows of the Simpson residence, near where Mr. Simpson had been. Officer Boggs corroborated the testimony concerning the bullet holes through the Simpsons' front windows. Petitioner admitted

that upon returning to his father's house to retrieve the shotgun, he pushed his father down to get to the shotgun. He admitted he had been gone from the Simpson residence about 30 minutes prior to the shooting. Importantly, Petitioner admitted on cross-examination that he had begun to cool off by the time he got to his father's house. Petitioner's father testified that Petitioner forced him down to retrieve the shotgun, and stated he was going to "kill the son of a bitch." Clearly the foregoing testimony was sufficient for the jury to reasonably conclude that Petitioner's heart was "fatally bent on mischief."

Doubtless some of the preceding testimony could also have supported an inference of "heat of passion" manslaughter. However, in light of the fact that the jury had conflicting evidence on that point, *i.e.,* Petitioner's own admission he had cooled off versus his father's testimony he was in a wild rage, the jury was within its authority in concluding that Petitioner had cooled off enough to be guilty of murder. Similarly, Petitioner's self-defense claim was also subject to numerous interpretations. Petitioner testified that his purpose in returning to the Simpson residence was not to kill his brother

(in contrast to his own statements to his father that he would "kill the son of a bitch"), but rather, he was simply returning to the residence to ask his brother why he had been tormenting him for several years. Petitioner testified that once there he was confronted with Charles pulling a gun on him, and that he shot the brother in self-defense. Although returning to the Simpson residence might not have been the most intelligent action Petitioner could have taken, clearly if the jury had believed his statement that his purpose in returning was to question his brother and that once there he was faced with a deadly confrontation from his brother, he could have prevailed on self-defense. Regrettably for Petitioner, he gambled and lost: the jury obviously discredited Petitioner's account of events.

As to possible appellate ground (2) above concerning the requested charge, the court has been unable to locate any South Carolina case, even today, that requires such a jury instruction. Therefore, based on the absence of any merit to Petitioner's two preserved grounds for appeal, the court concludes that Mr. Lesesne's failure to perfect an appeal of the 1970 conviction did not render Petitioner's murder conviction unreliable within the meaning of *Fretwell.*

Having concluded, therefore, that Petitioner suffered no prejudice from Mr. Lesesne's alleged failure to perfect the appeal, the court considers the remaining ineffectiveness claim based on alleged trial deficiencies. Petitioner asserts his 1970 counsel inadequately prepared for trial, failed to impeach the Simpsons with evidence of their intoxication, was unable to elicit character evidence about Petitioner from a witness, and called as witnesses Petitioner's father and step-mother, who provided damaging evidence against Petitioner. Of course, once again, the court is handicapped in its merits review because of the absence of any testimony from trial counsel as to his trial strategies. However, based on the court's review of the transcript, it is apparent that trial counsel did not render deficient performance.

Under *Strickland v. Washington,* 466 U.S. 668 (1984), Petitioner must demonstrate that his counsel's representation fell below an objective standard of reasonableness, and that, but for counsel's errors, the result of the proceeding would have been different. Petitioner can do neither. Evidence of the Simpsons' intoxication was abundant in the record, and evidence of Petitioner's good character was provided by his step-mother. Although some damaging evidence came from Petitioner's father regarding Petitioner's statement that he was going to "kill the son of a bitch," (State's Supp. Return at 217) his father also provided evidence that Petitioner was very angry and still in the heat of passion, which would have supported a voluntary manslaughter conviction. There is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. *Bunch v. Thompson,* 949 F.2d 1354 (4th Cir. 1991). Petitioner has advanced nothing to rebut that presumption, nor has he demonstrated prejudice from the alleged deficiencies.

Accordingly, the court finds, based on its examination of Petitioner's two exhausted ineffectiveness claims asserted in Ground 1, that neither has merit.

B. Ground 2:
Petitioner's 1970 murder conviction was obtained in violation of his right to the conflict-free assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

(i). General

Petitioner's 1970 counsel, Mr. Lesesne, had previously represented Charles Atkins. Petitioner contends that because of Lesesne's prior attorney-client relationship with the victim, counsel placed himself in an untenable position in which he was forced to chose between betraying the confidence of former client Charles, or zealously representing Petitioner. Specifically, Petitioner contends that counsel failed to introduce much of the abundant evidence establishing Charles' bad character and

violent tendencies.[11]

(ii). Procedural Bars

This purported conflict-of-interest claim was not presented as a specific ground for relief in the prior PCR proceeding before Judge McLeod challenging the 1970 murder conviction. Where a state court has not had an opportunity to apply its procedural bar, a federal court will nevertheless bar the claim where application of the bar is clear. For the reasons given above in Ground 1, subsections (iii) and (iv), the court finds that South Carolina's doctrine of laches serves as an independent and adequate state procedural default rule barring this matter from federal court review. *See also Coleman v. Thompson,* 501 U.S. 722 (1991); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990). Moreover, the court finds that Rule 9(a), Habeas Corpus Rules, is a procedural bar to a conflict-of-interest claim where the allegedly ineffective attorney has been deceased almost ten years, and where the claim arose 27 years ago.

(iii). Merits of Alleged Conflict-of-Interest Claim

In the event procedural bars do not apply, the court reaches the following alternative conclusion. The court has undertaken a merits assessment of Ground 2. The court has carefully reviewed the transcript from the 1970 murder trial and finds that Petitioner's claim that counsel was somehow inhibited or restricted from presenting evidence concerning Charles' bad character lacks foundation in the record. To the contrary, the jury in Petitioner's 1970 trial was under no misapprehension that Charles Atkins was a choir boy.

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[11]Petitioner, quoting the well-known Georgia criminal defense attorney Bobby Lee Cook, observes that "[t]here are two critical questions in any murder case: Did the son of a bitch need killing and did the right son of a bitch kill him?" Petr's Memo in Opposition to State's Motion for Summary Judgment, at 30.

The following portrait, based on the victim's character and circumstances of death, was drawn before the jury. Dr. Sexton, the pathologist, testified that the victim had been drunk at the time of the killing. (Suppt'l App. I, at 28). Mrs. Simpson, a married woman at whose home the victim was fatally shot, testified she and the victim would regularly go to drive-in movies alone together. Petitioner testified that while he was attempting in a chivalrous manner to protect Mrs. Simpson from an armlock-type assault by her husband that night, Charles came over to Petitioner and began pistol whipping him. (*Id.* at 127). Petitioner and his father both testified that Charles had stabbed Petitioner in 1966 and that Petitioner nearly died from having his intestines sliced in two parts. (*Id.* at 130, 190). Petitioner's father testified about how Petitioner bravely refused to tell the police Charles had done the stabbing because he did not want to get him in trouble. Petitioner, and a hunting companion, Mr. Fitt, both testified that while hunting, Charles would randomly shoot at Petitioner and the other hunters. As Petitioner described, Charles "just said it wasn't nothing else to shoot at." (*Id.* at 134, 205). Petitioner related another incident, shortly before the fatal shooting, in which the victim had been losing at a billiards game and came up to Petitioner and began hitting him with the butt end of the pool stick. (*Id.* at 135). Petitioner's father confirmed that Charles had been in prior legal troubles, including theft of an automobile, and his step-mother testified that he had served 18 months in prison. (*Id.* at 202).

Based on the court's examination of the entire record in this proceeding, the only notable "bad character" evidence about the victim the jury did not hear pertained to two prior incidents. One occurred long before the fatal shooting, and involved the victim's stabbing Petitioner with a broken bottle**.** The second incident was an indecent exposure charge in which Charles pulled his pants down and urinated at a group of little girls. Such evidence, even if admissible, was cumulative to the

evidence noted in the preceding paragraph. In any event, the court concludes that there was no absence of evidence before the jury concerning Charles' disposition and propensity for violent assaults.

Petitioner has pointed to no ethical rule or court decision establishing that Lesesne's representation of Petitioner, killer of his former client, was a *per se* actual conflict of interest. However, even assuming *arguendo* that it was, Petitioner cannot prevail. A defendant must be able to demonstrate that his lawyer actively pursued conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance for constitutional error to occur. *Cuyler v. Sullivan,* 446 U.S. 335, 350 (1980). Petitioner has failed to carry his burden of demonstrating that any alleged "actual conflict of interest" adversely affected his lawyer's performance because ample, compelling evidence of the victim's bad character was clearly put before the jury and any omitted evidence would have been cumulative if not inadmissible.

C. Ground 3:
The trial court's instructions in the 1970 murder prosecution shifted to Petitioner the burden of disproving malice and of proving self-defense in violation of the Fourteenth Amendment to the Constitution.

In this claim Petitioner attacks several jury instructions in the 1970 trial.[12] Specifically, he challenges the self-defense and malice charges. A review of the 1970 trial record reveals that counsel did not object to these charges, nor request additional instructions. (Suppt'l App. I, at 238-240). These challenges have never been presented to the state supreme court. Issues which should have been raised at trial or appeal cannot be raised for the first time in a state PCR action. *Simmons*

[12]Petitioner contends that no charge was given as required by *State v. King,* 155 S.E. 409 (S.C. 1930) (jury bound to resolve doubt between murder and manslaughter in Petitioner's favor). The State appears to concede no charge was given. Both counsel are in error. The transcript discloses a full *King* charge was given by Judge Singletary. (Suppt'l App. I, at 226).

v. State, 215 S.E.2d 883 (S.C. 1975).

As with Grounds 1 and 2 above, the court finds these claims procedurally barred. South Carolina has a contemporaneous objection rule, Rules 207 and 208, SCACR; *Peeler v. State,* 283 S.E.2d 826 (S.C. 1981). This provides an independent and adequate state ground barring federal review.

Even if these claims were not procedurally barred, the court concludes Petitioner would not prevail. As to the malice instruction, the instruction today is undoubtedly flawed under *Sandstrom v. Montana,* 442 U.S. 510 (1979), a decision rendered nine years after Petitioner's conviction. At the time of Petitioner's trial, it was, however, correct. Petitioner contends the rule of *Sandstrom* should be applied retroactively to bar the use of the 1970 conviction as an aggravating circumstance in the 1986 proceeding. A conclusion of retroactive application is reasonable based on the Supreme Court's decision in *Yates v. Aiken,* 484 U.S. 211 (1988). There the Court concluded that *Francis v. Franklin,* 471 U.S. 307 (1985), a case described by the Court as based on *Sandstrom*, should be given retroactive effect. The question presented here would be whether retroactive application of *Sandstrom* extends to Petitioner, whose 1970 conviction was long settled at the time of both the *Sandstrom* decision and the 1986 guilt-phase proceeding.

The court finds that it does not need to reach this issue because any error based on failing to accord retroactive application of *Sandstrom* to strike a 1970 conviction that served as an aggravating factor was harmless beyond a reasonable doubt. Even where an instruction constitutes impermissible burden shifting, any error in giving it may be found harmless if the reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the burden shifting presumption in order to convict. *See Rose v. Clark,* 478 U.S. 570, 580 (1986) (erroneous malice

instruction impermissibly shifting burden of proof does not require reversal). *See also Washington v. Murray*, 952 F.2d 1472 (4th Cir. 1991) (evidence of malice overwhelming); *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990). Based on the court's examination of the 1970 trial transcript, the court finds that the prosecution amply established Petitioner's intent to commit murder, independent of the improper malice charge. As described above in Ground 1, considerable evidence of Petitioner's malice was introduced. Accordingly, Petitioner's claim based on an alleged *Sandstrom* error is harmless.

As to the self-defense charge, as recently as 1987, 17 years after Petitioner's trial, the Supreme Court confirmed in *Martin v. Ohio,* 480 U.S. 228 (1987), that a requirement that the defendant prove self-defense did not violate the Constitution.[13] More recently, the Fourth Circuit in *Smart v. Leeke,* 873 F.2d 1558 (4th Cir. 1989), found that placing the burden of proof of self-defense on the defendant in a South Carolina murder prosecution did not violate due process. The self-defense charge given by Judge Singletary comported with *Martin v. Ohio*, 480 U.S. 228 (1987), and *Smart v. Leeke*, 873 F.2d 1558 (4th Cir. 1989). The court stated that notwithstanding the self-defense plea, the State had to prove all material elements of murder beyond a reasonable doubt (Suppt'l App. I at 220). Thus, Petitioner's claims lack merit.

D. Ground 4:
Petitioner was denied the effective assistance of trial counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution by 1986 counsels' failure pursue a verdict of guilty but mentally ill.

(i). General

In this claim Petitioner contends that his 1986 trial counsel, Joe Kent of the Charleston Public

[13]The state supreme court established a new model self-defense charge in *State v. Davis*, 317 S.E.2d 452 (S.C. 1984), which was made mandatory in *State v. Glover*, 326 S.E.2d 150 (S.C. 1985).

Defender's Office, and David Adams, a private attorney, were ineffective in failing to pursue a Guilty but Mentally Ill (GBMI) verdict during the guilt phase of the trial. Petitioner argues neither counsel was aware of the statute, which had been enacted in 1984, nor were they sufficiently knowledgeable to use it effectively. He submits that their ignorance led to an unfocused mental health evaluation. He contends a proper evaluation could have been used to support a GBMI verdict at trial and to provide additional mitigating evidence at the penalty phase.

Specifically, Petitioner charges that counsel failed to properly consult with the expert, Douglas F. Crane, M.D., a psychiatrist, and neglected to ask him about the possible use of GBMI. He relies on an affidavit of Dr. Crane submitted to the state PCR judge weeks after the hearing in which Dr. Crane states that 1986 counsel asked him to evaluate Petitioner for a substance abuse problem, but never asked him to evaluate Petitioner to determine if he satisfied the GBMI criteria. Dr. Crane further opines that had he been asked to give a GBMI evaluation, he would have found that Petitioner was GBMI at the time of the 1985 killings based on his alcohol dependence and intoxication.

The State contends that this issue was abandoned in Petitioner's last Petition for a Writ of Certiorari to the Supreme Court of South Carolina, filed March 31, 1995. Accordingly, the State argues the issue is procedurally barred because it has not been presented to the state appellate court. In the alternative, the State contends that the claim lacks merit and that 1986 counsels' actions reveal neither "deficient performance" nor "prejudice" under the two-prong standard of *Strickland v. Washington,* 466 U.S. 668 (1984).

(ii). Procedural Bar Defense

Under general South Carolina appellate practice, "no point will be considered which is not

set forth in the statement of issues on appeal." Rule 207(b)(1)(B), SCACR. Rule 227(d), SCACR, sets forth the rules concerning the content of a petition for writ of certiorari to review PCR actions. It provides that the petition shall contain the questions presented for review. An inmate represented by appointed counsel before the Supreme Court of South Carolina in a PCR matter cannot file a motion or petition on his own independent of the petition filed by his counsel. *Foster v. State,* 379 S.E.2d 907 (S.C. 1989).

When Petitioner, by appointed counsel Joseph Savitz, filed his Petition for Writ of Certiorari from Judge Bristow's denial of PCR on March 31, 1995, he did not present the GBMI issue in the questions presented for review. The State's Return to the Petition filed on June 14, 1995, specifically noted on page 74 n. 10 that all issues related to the 1986 conviction had been abandoned in the petition. Subsequently, nearly one year later, Petitioner filed his "Supplement Petition for Writ of Certiorari," on May 7, 1996. This pleading asked to amend the petition to add a GBMI claim, to relieve attorney Savitz, and to appoint the Post-Conviction Defender Organization. (State's Suppt'l Return filed March 5, 1997). The State opposed the request. On July 11, 1996, the Supreme Court issued two letter orders, one stating "Petition for Writ of Certiorari denied," and the other stating "Motion to Substitute Counsel is denied."

In *Wainwright v. Sykes,* 433 U.S. 72 (1977), the Supreme Court held that when a defendant is procedurally barred from raising a federal claim in state court, he may not raise that claim on federal habeas corpus absent a showing of "cause" for the procedural default and "prejudice" from the failure to raise the federal claim. *Wainwright's* rule is not limited to claims barred only by a violation of a state-law contemporaneous objection requirement. In *Murray v. Carrier,* 477 U.S. 478 (1986), the Court applied the cause-and-prejudice standard where the procedural default was a failure

to include the federal claim among the issues presented on direct appeal. *Id.* at 490-92. The Court in *Carrier* suggested that the *Wainwright* rule applies to all state-law procedural defaults:

> We likewise believe that the standard for cause should not vary depending on the timing of a procedural default or on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at each successive stage of the judicial process. "Each State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently."

Id. at 491. [citations omitted] In *Coleman v. Thompson,* 501 U.S. 722 (1991), the failure to properly appeal an issue from the denial of a state PCR, as required by state law, barred federal review absent cause and prejudice.

On this record, the court finds that Petitioner's GBMI claim is procedurally barred. It was never listed as a question for review in Petitioner's Petition for a Writ of Certiorari, as required by Rule 207, SCACR. Petitioner's belated *pro se* attempt eleven months later to revive the claim by seeking permission to amend his petition was ineffective under state law because Petitioner was already represented by appointed counsel, *Foster v. State,* 379 S.E.2d 907 (S.C. 1989).

The Fourth Circuit has held that in order to satisfy the exhaustion requirement, a habeas litigant must present his claims "face-up and squarely," thus providing the state court with "a full and fair opportunity" to consider them. *Mallory v. Smith,* 27 F.3d 991, 994-95 (4th Cir.), *cert. denied,* 115 S.Ct. 644 (1994). Mere "vague whispers" of a claim are insufficient to satisfy the exhaustion requirement. *Id.* at 995-96. In *Stout v. Netherland,* 95 F.3d 42, 1996 WL 496601, (4th Cir. 1996) (unpublished), the court found a capital defendant's claim of ineffectiveness arising from his counsel's advice to plead guilty procedurally barred. There, the petitioner had attempted to raise this claim in a *pro se* writ of error filed with the Virginia Supreme Court while his case was still

pending on review of his state PCR.

Petitioner contends that the court should apply the plain statement rule and "look through" the letter order of the Supreme Court and consider the matter based on the state circuit court's denial of the claim, *Ylst v. Nunnemaker,* 501 U.S. 797, 803 (1991). However, that doctrine has no application where, as here, Petitioner's claim on the merits was never presented in the original petition and the Supreme Court never granted the request to amend the petition. In other words, the plain statement rule is inapplicable where the claim was not presented to the highest court with jurisdiction to decide it. *Coleman,* 501 U.S. at 735; *Teague v. Lane,* 489 U.S. 288, 299 (1989). Thus, where as here, the highest state court has not had opportunity to apply its procedural bar of Petitioner's abandonment of the GBMI claim, the federal court will nevertheless bar the claim where the application of the law is clear. *Teague,* 489 U.S. at 297-98; *Bassette v. Thompson,* 915 F.2d 932, 937 (4th Cir. 1990), *cert. denied,* 499 U.S. 982 (1991). It is not a question here of divining whether the state supreme court disposed of Petitioner's GBMI claim based on state procedural rules or federal law.

Here the state appellate court never got to the GBMI claim at all because Petitioner had earlier abandoned the claim and the court denied Petitioner's motion to substitute counsel, which contained the request to amend the petition. The court is confident, however, that had the court been presented with the claim it would have found it barred under Rule 207, SCACR.

Based upon the record, the court concludes that Petitioner's claim that 1986 trial counsel were ineffective in failing to pursue a GBMI verdict at his guilt-or-innocence trial was never squarely presented to and accepted by the state supreme court for review. Accordingly, Petitioner, by appointed counsel, abandoned this issue.

(iii). Presumption of Correctness as to whether 1986 counsel pursued GBMI

Respondents contend the affidavits of Dr. Waid and Dr. Crane contradict the testimony of Attorneys Kent and Adams that they investigated a possible GBMI verdict. The PCR judge, however, after hearing the testimony of the two attorneys, found, that "contrary to Applicant's assertions, defense counsel were aware of GBMI and also sought to investigate the existence of such a verdict as it relates to Mr. Atkins prior to the 1986 trial." (App. 4567). The sole conflicting evidence on this point was the affidavit of Dr. Crane received after the PCR hearing. The PCR judge did not credit this affidavit because it had not been subject to cross-examination. Accordingly, the PCR judge concluded that the attorneys' investigation was not deficient and that no prejudice had been shown in any event, because Dr. McKee, another of Petitioner's experts in the 1992 proceeding, testified Petitioner would not qualify for GBMI. The state court's findings of fact as to credibility, made after a full and fair hearing, are entitled to deference under 28 U.S.C. § 2254(d). *See also Parke v. Raley,* 506 U.S. 20 (1992) (presumption of correctness attaches to all state court determinations of historical fact, "including inferences properly drawn from such facts," or "inferences fairly deducible from these facts").

(iv). Deficient Performance and whether 1986 counsel pursued GBMI

Even if the state court's finding above is not entitled to a presumption of correctness, the competent evidence adduced on this issue establishes that 1986 counsel fully exhausted the avenue of psychiatric and mental status defenses, including specifically, GBMI. Attorney Kent testified that he obtained an evaluation from Dr. Waid and that "there was no diagnosis sufficient to make a claim of mental illness." (App. 3173). In addition, Kent interviewed two other doctors, Dr. Orvin and Dr. Crane. Kent testified those doctors also indicated there were no available mental defenses. Dr.

Crane also discounted "almost completely" a diagnosis of post-traumatic stress in 1986. (App. 3174).

Attorney Adams corroborated much of Kent's testimony, including the testimony that neither Drs. Waid, Outz or Crane were able to help out by way of finding either a mental disease or defect or diminished capacity. (App. 3189-90, 3196). Adams specifically recalled that Drs. Waid and Outz had rejected a GBMI theory.

Petitioner claims the above testimony is expressly contradicted by the affidavits of Drs. Waid and Crane. However, Dr. Waid's affidavit is completely silent as to GBMI. He does state that the purpose of his evaluation was "to determine, through neuropsychological testing, whether an organic explanation for Mr. Atkins' crimes could be determined." The court does not construe Dr. Waid's affidavit as contradictory to the testimony of the two attorneys.

Dr. Crane's affidavit states that:

> I was not asked at the time of Mr. Atkins' trial to review the Guilty but Mentally Ill statute or to make a determination as to whether Mr. Atkins met the criteria for this verdict. Had I been asked to do so, I would have been able to testify that Mr. Atkins was guilty but mentally ill at the time of the offense.

(Petr's Motion to Expand the Record). Dr. Crane's diagnosis of GBMI is premised on his belief that, "as a result of Mr. Atkins' alcoholism and intoxication at the time of the offense, he lacked sufficient capacity to conform his conduct to the requirements of the law." These were, of course, facts well known to Dr. Crane at the time of his 1986 evaluation but Petitioner would have the court believe that, but for his counsels' errors in failing to place the GBMI statute squarely under Dr. Crane's nose, he would have secured a GBMI verdict.

Crane's evaluation six years later, which has not been subject to cross-examination, is of

minimal assistance. Even if the court were to credit Dr. Crane's assertion and find that neither Kent nor Adams asked Dr. Crane about GBMI, that does not prove deficient performance by either counsel. In *Roach v. Martin,* 757 F.2d 1463, 1477 (4th Cir.), *cert. denied,* 474 U.S. 865 (1985), the court found that trial counsel had no "affirmative duty to shop around" for favorable expert opinions. It is uncontradicted that Attorney Kent asked Dr. Waid to do a full scale of psychometrics on Petitioner, which resulted in no mental illness diagnosis. The testimony is also uncontradicted that neither Dr. Orvin nor Dr. Outz found mental disease or defects, which would encompass GBMI. However, these doctors did find that Petitioner had a chronic alcohol abuse problem, for which problem Dr. Crane was specifically retained. Therefore, even if trial counsel did not ask Dr. Crane about GBMI in 1986, this would not have been deficient because the uncontradicted record shows counsel made repeated inquiries of several other doctors, all of whom had found no mental disease or defect.

(v). Prejudice

Even assuming *arguendo* that counsel did not ask Dr. Crane specifically about a GBMI defense and that the omission could somehow be deemed "deficient performance," Petitioner would still fail on this claim because he has failed to satisfy the second prong of the *Strickland v. Washington* test: prejudice. The court finds that Petitioner cannot establish any prejudice for two independent reasons. First, Petitioner cannot prove by a preponderance of the evidence that he would have been eligible for a GBMI defense. Second, even assuming that Petitioner would have qualified for a GBMI verdict, Petitioner cannot show there is a reasonable probability that he would not have received two death sentences for the murders, notwithstanding a GBMI guilt verdict. In other words, would GBMI have made any real difference? The court thinks not.

In South Carolina, the GBMI verdict is defined as:

> A defendant is "guilty but mentally ill" if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong as defined in Section 17-24-10(A), but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law.

S.C. Code Ann. § 17-24-20(A). This is sometimes described as the "irresistible impulse" defense. *See State v. Wilson,* 413 S.E.2d 19, 21 (S.C. 1992). As the state supreme court has acknowledged, "the irresistible impulse test is very difficult, if not impossible, to apply with accuracy. It has been suggested that it is impossible to say that an impulse was irresistible rather than unsuccessfully resisted, or to distinguish between the uncontrollable impulse and the impulse that is not controlled." *Id.* at 23 [citations omitted]. The court also recognized that, "the irresistible impulse test is plagued by internal debate over its validity within the profession of psychiatry." *Id.*

The purposes for the GBMI statutes are: (1) to reduce the number of defendants being completely relieved of criminal responsibility due to their mental condition; and (2) to insure mentally ill inmates receive treatment for their benefit as well as society's benefit while incarcerated. *State v. Hornsby,* ___ S.E.2d ___,1997 WL 211784 (S.C. 1997). A verdict of GBMI does not absolve a defendant of guilt. A defendant found GBMI must be sentenced as provided by law for a defendant found guilty. *Id.* However, under the statutory scheme, a GBMI defendant is entitled to immediate treatment and evaluation. S. C. Code Ann. § 17-24-70.

In addition, as the Supreme Court of South Carolina found in *Wilson*, a defendant found GBMI for actions taken on "irresistible impulse" may constitutionally be sentenced to death. 413 S.E.2d at 27. The court clarified that, "we interpret [the language in § 17-24-20(c) indicating that a GBMI defendant will still have a bifurcated capital case]. . . to prohibit juries or judges from

treating the [GBMI] defendant as anything other than an ordinary 'guilty' defendant for purposes of rendering their sentencing verdict." *Id.* at 21. Contrary to Petitioner's assertion that the GBMI statute is designed to reduce culpability of some defendants in South Carolina,

> [T]he GBMI statutes were created in part to narrow the field of defendants who could successfully claim a lack of culpability via the insanity defense. [Defendant] seeks here to use the verdict as a shield to protect him from punishment, which is contrary in a fundamental way to its creation as a mechanism to enable the state to punish and treat a larger group of defendants.

Id. at 22. The relevant question here is, assuming *arguendo* that Petitioner would have been eligible for and actually received a GBMI verdict in the guilt phase of the 1986 trial, would it have altered the sentencing jury's assessment of aggravating and mitigating circumstances? *Strickland,* 466 U.S. at 695. In light of *Wilson*, Petitioner cannot demonstrate that a GBMI verdict would have precluded the death sentences. Therefore, Petitioner fails to show prejudice under *Strickland*.

E. Ground 5:
The 1986 trial judge's refusal to submit a possible verdict of involuntary manslaughter with respect to the homicide of Karen Patterson violated Petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution.

At the guilt phase of Petitioner's trial, his counsel requested that the trial judge charge the lesser included offense of involuntary manslaughter in connection with the death of Karen Patterson. Petitioner's theory was that her shooting had been merely a reckless act, and that the physical evidence--a single fatal shot from five to fifteen feet way that struck the upper portion of the victim's head--could well have supported that theory. The trial judge rejected Petitioner's argument, finding that the evidence in the case did not support an involuntary murder charge.

"A defendant is not entitled to have the jury instructed as to lesser degrees of the crime simply because the crime charged is murder." *Briley v. Bass,* 742 F.2d 155, 164 (4th Cir.), *cert.*

denied, 469 U.S. 893 (1984). Rather, "the Circuit and the Supreme Courts agree that lesser included offense instructions are not required where . . . there is no support for such instructions in the evidence." *Id.* at 165. Under the rule of *Beck v. Alabama,* 447 U.S. 625 (1980), due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. Therefore, if a defendant has a particular theory of defense, he is constitutionally entitled to an instruction on that theory if the evidence supports it.

The elements of murder and involuntary manslaughter in South Carolina are well known. Murder is the killing of any person with malice aforethought, either express or implied. S.C. Code Ann. § 16-3-10. Involuntary manslaughter is the unlawful, unintentional killing of another without malice, either express or implied. *State v. Barnett,* 63 S.E.2d 57 (S.C. 1951); S.C. Code Ann. § 16-3-50. A finding of guilt as to involuntary manslaughter can only be made upon a showing of criminal negligence. S.C. Code Ann. § 16-3-60. Although involuntary manslaughter is a lesser included offense of murder, the element of malice distinguishes the two offenses. The presence of evidence to sustain a conviction for the crime of the lesser degree determines whether it should be submitted to the jury. *State v. Dingle,* 306 S.E.2d 223 (S.C. 1983). Here, the undisputed facts adduced at trial did not lend support to Petitioner's theory of a merely reckless or "stray bullet" shooting, nor negate the compelling conclusion that Petitioner's actions were accompanied by malice.

Arthur "Bootsie" Henderson, Petitioner's drinking buddy during the hours preceding the killings, testified that Petitioner disclosed to him that, "well, when I go home anything I see in sight I'm going to kill." (App. 711). And, sadly enough, the events here satisfied that prediction. After arming himself in the wee hours of the morning with a machete and shotgun, Petitioner crept around

to the back of the Polite family's residence and cut their telephone lines. The only inference from that is that he was intending to commit some deed and did not want the family to be able to communicate with others. Then, despite the fact that Petitioner had previously had only scant acquaintance with the Polite family, he burst into their house at daybreak and, standing at the door of Karen's bedroom, fired a blast that removed the top portion of her head. Unfortunately, the girl must have apprehended her imminent attack because she suffered defensive wounds to the hand she used to shield her face. Following Karen's shooting Petitioner pursued Aaron Polite into the street, shooting at him.

This is hardly the sort of negligent discharge of a weapon that may occur during, for example, a gun cleaning process. The trial judge had little difficulty concluding that Petitioner's actions toward Karen Patterson were accompanied by malice--that this was an execution and not an accident. This court agrees, and finds that the record is devoid of any evidence to support the contention that Petitioner's shooting of Karen Patterson was merely reckless. *Cf. Kornahrens v. Evatt,* 66 F.3d 1350, 1354-56 (4th Cir. 1995) (charge of voluntary manslaughter properly refused where no evidence existed to support it).

Even assuming *arguendo* that the evidence here might have supported the conclusion that Petitioner, in a drunken spree, inadvertently shot Karen Patterson while aiming at another object in her room, the charge of involuntary manslaughter was properly denied. In *State v. Craig*, 227 S.E.2d 306 (S.C. 1976) , the court found that the trial court did not err in refusing an involuntary manslaughter charge where the defendant admitted intentionally firing his shotgun, but claimed he only meant to shoot over the victim's head. Accordingly, the court concludes that the 1986 trial judge properly denied Petitioner's requested instruction on involuntary manslaughter because

Petitioner failed to adduce evidence to support it.

F. Ground 7:

Petitioner was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when his trial counsel failed to investigate and present impeachment evidence against a state witness, despite knowledge of that evidence.

Karen Patterson was killed in the early hours of October 27, 1985. Her mother, Fatha Patterson, filed a one million dollar lawsuit against Petitioner the next day. Ms. Patterson was a key witness for the State at the guilt trial and the resentencing proceeding. Her testimony at both trials was nearly identical. As the grieving mother, she was patently hostile to the defense.

It is unclear whether trial counsel in 1986 ever learned of the civil lawsuit at the time of their involvement.[14] It appears that the civil suit, *Fatha D. Patterson, as Temporary Administratrix of the Estate of Karen Fredericka Patterson, deceased v. Joe Ernest Atkins,* Case No. 85-CP-10-3957, which was filed on October 28, 1985, was dismissed under Rule 40(c)(3), SCRCP,[15] on July 23, 1986, two years before the resentencing hearing. At least one of Petitioner's 1988 counsel, Kathy Andrews, was vaguely informed that Ms. Patterson had previously filed a lawsuit, but she did not search the Clerk's Office records for it. When she testified at Petitioner's state PCR hearing, however, 1998 counsel Andrews opined such information might have been relevant to the interest

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[14]There was some vague testimony by 1986 counsel Adams that he "seems to remember that it [the lawsuit] was out there" but the date he acquired this knowledge is unclear from the record. (App. 3193). His state postconviction hearing testimony clearly indicates, however, that he viewed the utility of such information solely in the context of proving general hostility between the parties, such as might apply to any opposing parties. As such, he appears to have made the strategic decision that the other evidence amply demonstrated hostility between the parties and that the lawsuit evidence would simply be cumulative.

[15]Rule 40(c)(3), SCRCP, provides that if counsel in an action reached on the trial roster are not ready to go forward, the court shall strike the action from the calendar with leave to restore.

and bias of witness Fatha Patterson.

Thus, Petitioner argues that his 1986 and 1988 counsel were ineffective in failing to investigate and present the alleged "impeachment evidence" regarding the lawsuit filed by Ms. Patterson. Although somewhat vague as to how this evidence could have been used at trial, Petitioner seems to suggest it could have been utilized in two ways: (1) to neutralize the jury's sympathy for the grieving mother; and (2) to expose Ms. Patterson's bias because of the prospect of financial gain from the lawsuit.

The state PCR judge found that neither 1986 nor 1988 counsel were deficient in omitting evidence pertaining to the civil lawsuit. He found that the evidence of Ms. Patterson's bias against Petitioner, her daughter's killer, was already amply displayed to the jury from other evidence. Moreover, he concluded that even if the omission could be deemed deficient performance under *Strickland*, Petitioner had failed to prove prejudice, defined as "a reasonable probability that the outcome would have been different." (App. 4564).

(i). Claim as to 1986 counsel

Although issues pertaining to 1986 trial counsels' failure to develop evidence on the Patterson lawsuit were raised in the state PCR proceeding before Judge Bristow, Petitioner abandoned the claim as to 1986 counsel on writ of certiorari to the South Carolina Supreme Court. Petitioner's March 31, 1995, Petition for Writ of Certiorari to the South Carolina Supreme Court asserts in Question 1 that "Defense counsel did not provide effective assistance at petitioner's *resentencing* [1988 proceeding] where they failed to investigate and present evidence concerning a million-dollar lawsuit filed by the victim's mother the day after her daughter was killed." (Respondents' March 5, 1997, Supplemental Return). In its June 14, 1995, Return to the Petition

for Writ of Certiorari, the State's attorney specifically noted on p. 19 n.2 that "Petitioner has abandoned the ineffective assistance claim in this appeal concerning guilt phase counsel by failing to raise it in a question or argument." Thus, with ample notice that he had not renewed the ineffectiveness claim of 1986 counsel, Petitioner apparently elected not to revive this claim and present the issue to the South Carolina Supreme Court. To the extent that Petitioner now seeks to resurrect the claim for ineffectiveness of 1986 counsel because of an alleged failure to present evidence of the Patterson lawsuit, the court finds Petitioner never exhausted this claim. Even if the matter is considered exhausted because Petitioner has no state remedies to relitigate the claim, *Teague v. Lane*, 489 U.S. 288 (1989), the record abundantly demonstrates Petitioner knowingly abandoned the claim. Abandoned matters may not be the subject of federal habeas review under *Coleman v. Thompson*, 501 U.S. 722 (1991).

Finally, even if the issue as to 1986 counsel is not barred from review, it is unpersuasive on the merits for the reasons given below as to 1988 counsel.

(ii). Claim as to 1988 counsel

As noted above, Petitioner asserts that 1988 counsels' failure, despite some knowledge of the lawsuit, to develop and use such "impeachment" evidence against witness Fatha Patterson at the sentencing hearing denied him effective assistance of counsel. Petitioner contends the information could have been used in two ways: (1) to impeach Ms. Patterson's asserted grief in that within twenty-four hours of her daughter's death she had commenced a lawsuit against Petitioner; and (2) to impeach her by revealing hostility and bias based on a prospect of financial gain. On this record, the court finds no ineffectiveness.

Initially, Petitioner acknowledges that the hostility of Fatha Patterson was plainly evident

from the tragic circumstances, admitted by Petitioner's counsel, at the outset of the resentencing hearing. Petitioner admitted that he had committed the killing of Karen Patterson in her own bed, shortly before turning to his father. As 1986 counsel Joseph Kent recalled at the hearing before Judge Bristow, Ms. Patterson was "quite a belligerent witness" and "quite a presence on the stand" (App. 3176, 3182) at the 1986 trial. 1986 co-counsel Adams corroborated that Ms. Patterson was "very emotional about the loss of her daughter." (App. 3193). Her 1988 testimony was nearly identical to the 1986 testimony as it related to the brutality and tragedy of her daughter's death. (App. 1841-69).

The court finds any purported benefit from the lawsuit evidence grossly speculative. The lawsuit sought damages for the pain, suffering, grief, and expenses arising from Karen's death. The pleadings stated on their face that the loss of Karen, Ms. Patterson's only child, had been a tremendous personal loss to her. (Supp. App. II at 5-10). It is at least as plausible that a juror might conclude that Ms. Patterson's haste to initiate the civil lawsuit against Petitioner, notwithstanding the grief and duties immediately attendant upon Karen's death, was entirely due to the fact that she was grievously outraged and intent on bringing the whole panoply of criminal and civil proceedings into force. Rather than undercut the grieving mother's loss, such testimony could conceivably corroborate the loss. Moreover, any attempt to trivialize the mother's loss could well have been viewed disdainfully by the jury and "backfired" against the defense team.[16]

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[16]In capital sentencing proceedings, the decision of the jury is to be based on the character and the record of the individual offender and the circumstances of the particular offense. *McLeskey v. Kemp,* 481 U.S. 279, 302 (1987). Even though some victim impact evidence is allowed in a capital sentencing trial, *Payne v. Tennessee*, 501 U.S. 808 (1991), jurors are not free to return or not return the death penalty depending on the weight of the victim's loss. Thus, any attempt by Petitioner to impeach Fatha Patterson with the lawsuit in an attempt to demonstrate her shallow grief would have been of limited relevance in the resentencing proceedings.

As to the second purported use for such testimony, the chronology of the civil lawsuit belies Petitioner's contention. Petitioner argues that the lawsuit evidence could have been used in 1988 to demonstrate Ms. Patterson's alleged bias due to prospect of financial gain. Petitioner never explains, however, how a lawsuit that was dismissed two years before the 1988 resentencing proceeding could have motivated Ms. Patterson's 1988 testimony. Clearly any notion of pecuniary gain from Petitioner's actions had been long since abandoned by Ms. Patterson.

Based on the circumstances of this case, the court concludes that omission of the Fatha Patterson lawsuit was neither deficient performance nor did it constitute prejudice under the *Strickland* standard. *Hoots v. Allsbrook,* 785 F.2d 1214 (4th Cir. 1986). Failing to trivialize a grieving mother's anguish in the hours immediately following her daughter's senseless slaying is not outside the standard of reasonable performance by attorneys in South Carolina. *Marzullo v. Maryland,* 561 F.2d 540 (4th Cir. 1977). Moreover, even if such omission could be construed as deficient performance, it is clear that Petitioner suffered no prejudice. The relevant question is whether 1988 counsel's failure to present evidence concerning the civil lawsuit dismissed two years earlier could have altered the sentencing jury's assessment of aggravating and mitigating circumstances. *Strickland,* 466 U.S. at 695. In other words, would it have made any real difference? The court concludes it would not have.

G. Ground 9:

Petitioner was denied due process of law as guaranteed by the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when extraneous and arbitrary material--the Bible--was constructively introduced into the jury room during the 1988 resentencing proceeding and relied on as authority for the imposition of the death penalty.

This issue has previously been addressed with reference to Petitioner's Motion for an

Evidentiary Hearing on Ground 9. Those portions of the court's order denying that motion are incorporated here by reference. In this section the court considers the substantive law pertinent to Petitioner's argument that improper outside influence or prejudicial extraneous information gleaned from biblical research denied him due process.

In her closing argument 1988 resentencing counsel Kathryn Andrews recited a biblical story illustrating mercy.[17] The State's attorney, who had not referenced the Bible in any of his arguments,

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[17]Ms. Andrews presented the jury with the following stirring story:

> There's a story in the Bible about a death penalty case that I'm sure that many of you or all of you are familiar with, that there was a woman caught in the act of adultery . . .
>
> And Jesus was at the Temple that day, and the people brought the woman to him and they were testing him. And they said, what say thee? She was caught in the act. And they thought they were going to trick him; and they thought that he would say, give her another chance, which would have been blasphemy, going against the law of the Bible. And they were all standing there with the stones ready to impose the death penalty. The law was clear. There wasn't any question of her guilt. And we know that Jesus didn't say what they thought he would. What he said was, let him who is without sin cast the first stone. And we know what happened. Everyone in the crowd slowly went home, dropped their stones. And maybe they knew why and maybe they didn't. They probably felt kind of awkward when they got home. And their friends and family said, well, I bet you really did it; I bet you gave it to her. They said, well, no we didn't, and I don't know. There was this guy there, and he said something; and I just didn't think it was right.
>
> What happened to those people in that crowd was that they were touched by mercy. It was a test. That day, each person in that crowd was tested. And it could be that one of you or two of you or all of you are being tested today. It could be that it's just a couple of you who are being tested and the rest of the jurors are part of the test. It could be that a time comes in the jury room when a piece of paper comes around to you and there are eleven names on it and you have to make a choice between going along or doing what you think is right.

(App. 2340-42).

did not object to Ms. Andrews' closing.[18] In the charge following the defense closing, the court instructed:

> I instruct you that your sentencing decision must be based only on the evidence that has been presented in this case, pertaining to the particular circumstances of the crime and the character and background of this defendant.

(App. 2367).[19] Jury deliberations commenced and after several hours, about 9 p.m., the jury reported that it was deadlocked, 10-2. However, when called into the courtroom, the forelady expressed the jury's desire to retire for the night and continue deliberations the next day. Unknown to the court until the next day, the forelady had approached a bailiff that evening. She asked what to do and how to tell the judge about a juror who appeared not to be able to return the death penalty under any circumstances and who apparently had not understood the qualification proceedings. The bailiff correctly refused to answer her question, but did alert the court about the inquiry the next day. The judge called the jury in and instructed them that a question had been related to him by the bailiff and if the jury wished to renew the question in writing, he would consider answering it. The forelady did not renew the question. After about one and one-half hours of deliberation, the jury unanimously returned death verdicts for the two murders. When polled, all jurors acknowledged that the verdicts had been and remained their verdicts.

After Petitioner's direct appeal from the 1988 sentences, the (former) Death Penalty Resource Center initiated inquiries to the jurors in the 1988 resentencing proceedings. At the request of Mr. Blume, the Director, three employees contacted several of the jurors and wrote summaries of their

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[18]Ms. Andrews' PCR testimony stated, however, that had the State attempted to invoke biblical stories or passages in its argument, she would have objected. (App. 3034).

[19]During the extensive capital *voir dire*, all seated jurors had already sworn they would return a verdict based solely on the evidence produced at trial and the court's instructions.

conversations. The defense contended that their investigations revealed that improper outside influence, to wit: written biblical chapter and verse citations, jotted down by juror Geraldine Melvin Heyward, had been used to sway the opinions of the two hold-out jurors.

At the PCR hearing before Judge Bristow, the judge found the testimony of the Center's employees regarding their inquiries inadmissible hearsay. He also ruled that testimony of four resentencing jurors was inadmissible as an attempt to impeach the jury verdict. Judge Bristow did, however, hear all the testimony under a proffer. He then ruled, in the alternative, that even if the testimony was admissible, it did not establish juror misconduct. Because of the complete record below, this court has concluded that no evidentiary hearing is required.

(i). Admissibility of Proffered Testimony

As a threshold matter the court considers Judge Bristow's rulings excluding the proffered testimony. As to the testimony of the Center's employees concerning their conversations with jurors, the court agrees that such testimony is rank hearsay not encompassed within any known exception.[20] However, the court concludes that the PCR judge erred in disallowing the proffered juror testimony concerning potential outside or extraneous influences on their deliberations.

The general rule is that juror testimony cannot be used to impeach a verdict. In South Carolina, however, the rule is that "[w]hen an extraneous influence is alleged, juror testimony can ordinarily be used." *State v. Hunter*, 463 S.E.2d. 314, 316 n.1 (S.C. 1995).[21] Use of the Bible would

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[20]The excluded testimony of the Center's employees is largely cumulative to the testimony of the four jurors. The only additional information provided in the employees' testimony is that the two juror holdouts were holding out on religious grounds.

[21]The common law rule of juror incompetency to impeach the verdict has been codified in Rule 606(b), Fed. R. Evid. In essence, the Rule provides that jurors cannot testify to the mental processes in their deliberations "except that a juror may testify on the question whether extraneous

fall within the rule of "extraneous influence."

Examination of the proffered testimony of the four resentencing jurors indicates it was limited to the singular issue of invocation of biblical quotations in the jury deliberations. Accordingly, the court finds the proffered testimony is precisely the sort of testimony that *State v. Hunter*, 463 S.E.2d 314, permits. Accordingly, this court considers the testimony of jurors Boese, Dudley, Humbert, and Heyward competent and admissible on the issue of potential outside or extraneous influence on the jury.

(ii). Challenged Juror Conduct

Juror Boese recalled that the Bible was quoted at times during deliberations, and he specifically remembered a reference to "blood crying from the ground." (App. 3051-52). Juror Dudley confirmed that biblical references were made during deliberations. (App. 3053-54). Juror Humbert recalled that the Bible was not read, but that it was quoted. (App. 3056). None of these three jurors recalled seeing written notes. Juror Melvin Heyward testified that she used the Bible in her motel room during the overnight recess. She stated that "there were references that I knew from memory, but simply didn't know where to find them." (App. 3059). She emphasized that she did not use the Bible to make up her own mind, but rather to find specific phrases she already knew.[22] As she explained,

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prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." As the Supreme Court has recognized, "[a] juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated on his mind." *Mattox v. United States,* 146 U.S. 140, 149 (1892).

[22]The fact that Ms. Heyward had already decided on death verdicts is corroborated by the fact that the vote at the end of the first day's deliberations was 10-2, and that the two holdouts did not include Ms. Heyward.

> There were in the course of the deliberations certain things came up, that there were references in my memory, in my Christian teaching, upbringing, my background that were already there, and I wanted to find those specific phrases. So that if we were to bring it up and discuss it, I could show them where I got it from.

(App. 3059). Juror Heyward testified she wrote down the chapter and verse references on a piece of paper and brought it into deliberations the next day. (App. 3060). To underscore her previous knowledge of these passages, she further explained that:

> I already possessed [knowledge of the biblical passages]. I knew what the scriptures were that concerned the punishment, that was needed out [sic][23] in the Old Testament, for the taking of a life, was in certain portions of the scriptures in the Old Testament in the book of Leviticus. I simply wanted to find chapter and verse, and that is why I consulted the Gideon's Bible that was there.

(App. 3061). Juror Heyward testified she referred to her notes during deliberations the second day. (App. 3060)

Based on the preceding testimony, the court finds juror Heyward consulted the Bible in her motel room after the close of the first day's deliberations. She had already made up her mind in favor of the death penalty. She consulted the Bible in order to obtain citations to biblical passages already known to her. The biblical passages were Old Testament references she felt supported the death penalty. She hoped to reference these passages in an attempt to break the deadlock. She wrote these citations (but not the passages) down on notes and took the notes with her into deliberations the next day. During deliberations she referred to the citations, although the number of times is unclear. None of the other jurors who testified recalled seeing juror Heyward use the notes in the deliberations.

(iii). Legal Analysis

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[23]This appears to be a phonetic transcription error. Ms. Heyward probably stated "meted out" rather than "needed out."

The question then is whether a juror who has refreshed her recollection by reference to specific biblical citations and who writes down the citations on notes referred to in deliberations in a capital sentencing proceeding introduces unlawful outside influence or extraneous information to the jury. If that question is answered affirmatively, then the court must consider whether the State has discharged the presumption of prejudice that flows from such unlawful influence.

Petitioner here does not argue that a juror's recitation or reliance upon biblical passages or quotations is itself unlawful; rather, Petitioner's argument hinges on the purported "constructive possession" of the Bible in the jury room during deliberations, accomplished through Ms. Heyward's reference to the motel room Bible and jotting down of citations.

Questions of potential extraneous information or outside influence on a jury in a capital sentencing proceeding are serious matters. The court has given careful consideration to this issue in the context of the governing law and the totality of circumstances of Petitioner's resentencing proceedings.

The court has reviewed numerous cases concerning alleged outside influence on jurors. Although a few reported cases address biblical materials, those cases involved deliberations in which the Bible itself was present and used in the jury room. Even there, the courts do not uniformly agree that the presence of the Bible is necessarily prejudicial. *Compare People v. Mincey,* 827 P.2d 388 (Calif. 1992) (reading of Bible was not substantially likely to prejudice defendant and reliability of jury's death sentence was not significantly impugned) *with Jones v. Kemp,* 706 F. Supp. 1534 (N.D. Ga. 1989) (jury's request for and receipt of Bible to be used in capital deliberations was constitutional error). The court could find no reported case addressing one juror's sole research into citation references for passages already known by her.

The court has considered several Fourth Circuit cases on outside juror influence. In *United States v. Cheek,* 94 F.3d 136 (4th Cir. 1996), the court found that an attempted bribe of a juror gave rise to an extrajudicial contact with the juror. The contact was presumptively prejudicial and the government failed to show that there was no reasonable possibility it affected the verdict. In *United States v. Acker,* 52 F.3d 509, 516 (4th Cir. 1995), where the defendant sought a new trial based on the affidavit of an excused juror stating that he would have held out for an acquittal, the court found that the defendant failed to make a threshold showing of outside influence. The court stated that post trial contacts with jurors are disfavored.

In *Haley v. Blue Ridge Transfer Co., Inc.*, 802 F.2d 1532 (4th Cir. 1986), the court found, however, that a non-juror's unauthorized remarks to the jury were presumptively prejudicial and that the opposing party failed to rebut that presumption. *See Stockton v. Virginia,* 852 F.2d 740, 741 (4th Cir. 1988) (comment to jurors while they lunched during sentencing trial that "they ought to fry the son of a bitch" was presumptively prejudicial and entitled defendant to new sentencing hearing), *cert. denied,* 489 U.S. 1071 (1989).

The test, then, appears to be that to establish a constitutional violation arising out of an outside or extraneous influence, the defendant must first establish "that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict." *Stockton,* 852 F.2d at 743. If that showing is made, the State "bears the burden of demonstrating the absence of prejudice." *Id.*

The court finds the alleged "unauthorized contact" at issue here--a juror's reference to a Bible to refresh her recollection--qualitatively different from the Fourth Circuit cases cited above. In none of those cases where there was a finding of extraneous influence did the jurors have previous

knowledge or exposure to the content of the contact. Here, however, juror Heyward was well familiar with the biblical passages to which she sought chapter and verse citations. Thus, the court concludes juror Heyward's reference to the Bible was not an "unauthorized contact" within the meaning of *Stockton* and its progeny.

Even assuming, however, that juror Heyward's reference to the Bible was an "unauthorized contact," the court does not find that the conduct reasonably draws into question the integrity of the verdict. This part of the two-pronged test necessarily overlaps to some extent with the element of "demonstrating the absence of prejudice." The uncontradicted record before the court is that juror Heyward already knew these biblical passages well. Her actions, even if they constitute an "unauthorized contact," brought no significant outside influence into the deliberations that she could not, and had not, supplied with her own knowledge. And while juror Heyward's arguments might have advanced her own personal religious beliefs into the sentencing proceeding, this court is unaware of any requirement that a capital juror be stripped of his or her own personal religious beliefs in jury deliberations.

Accordingly, the court finds Petitioner has failed to make a threshold showing of outside influence impugning the integrity of the death verdicts. In the alternative, the State has discharged any presumption of prejudice by demonstrating that the error was harmless in light of juror Heyward's prior knowledge of the biblical passages.

The court's finding that the integrity of the verdict is unimpaired mirrors a harmless error analysis. Under *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993), whether a constitutional trial error found in a habeas proceeding is harmless depends upon whether it had a substantial and injurious effect or influence in determining the jury's verdict. In light of the court's findings of fact

above, the court harbors no grave doubt that the error was harmless. *Cf. O'Neal v. McAninch,* 115 S.Ct. 992, 994 (1995).

A recent *en banc* Fourth Circuit decision concerning juror misconduct and personal investigation underscores that such errors may be harmless. In *Sherman v. Smith,* 89 F.3d 1134 (4th Cir. 1996), *cert. denied,* 117 S.Ct. 765 (1996), Chief Judge Wilkinson wrote that a juror's unauthorized visit to the murder scene during the trial, which included his observation of the house where the victims were found and the tree where the weapon was recovered, constituted harmless error. The petitioner had argued that his Sixth Amendment right to an impartial jury had been infringed. The court in *Sherman* assumed that the petitioner's constitutional rights had been violated but analyzed the conduct under a *Brecht v. Abrahamson,* 507 U.S. 619 (1993), harmless error test. Relying on numerous Supreme Court and Fourth Circuit cases in which juror misconduct and bias claims had been found to be harmless,[24] the opinion reasoned that the misconduct was not a structural error requiring a per se reversal of the petitioner's conviction. A structural error, such as the denial of counsel, is one affecting the entire conduct of the trial from beginning to end. 89 F.3d at 1137. In contrast, juror misconduct claims are based on "discrete moments in the course of an otherwise fair trial." *Id.* at 1138. Accordingly, the court concluded that the petitioner could not demonstrate the *Brecht* "substantial and injurious effect" standard.

Applying these standards, the court concludes that even if Petitioner's constitutional rights were violated by juror Heyward's reference to the Bible and notes of citations, such error was harmless under *Sherman.* There is no indication that juror Heyward's actions had a substantial and

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[24]*E.g., Smith v. Phillips,* 455 U.S. 209, 217 (1982) (juror's mid-trial application for employment in prosecutor's office was harmless and it is "virtually impossible" to shield jurors from every contact or influence that might theoretically affect their vote).

injurious effect on the jury's verdict.

H. Ground 10:

At his 1988 resentencing trial Petitioner was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution as a result of counsel's failure to develop and present available mitigating evidence regarding Petitioner's tragic background and post-traumatic stress syndrome.

This issue has been addressed above with reference to Petitioner's Motion for an Evidentiary Hearing on Ground 10. Those portions of the court's order denying the request are incorporated here by reference. This section addresses the substantive issues governing Petitioner's claim that his 1988 resentencing counsel denied him effective assistance of counsel by failing to develop and present certain mitigating circumstance evidence relevant to his sad family background and a diagnosis of post-traumatic stress disorder.[25]

(i). Facts

Although Petitioner's brief on Ground 10 cites a litany of complaints concerning 1988 counsels' alleged ineffectiveness in presenting his sad background and redeeming qualities, those complaints can largely be summarized as follows:

> If counsel had adequately investigated and presented the available evidence, they could have established that Petitioner was the product of a bleak and abusive environment, whose psyche was further damaged by his experiences in Vietnam, who was dependent on alcohol, and who was all the more affected by alcohol use because of his underlying brain atrophy. Moreover, the positive evidence that could have been given, of Petitioner's military honors, the testimony of people who knew and liked Petitioner, including his African American friend Herman Allen who he once saved from a fishing accident, and even his girlfriend's appreciation of his protectiveness and concern for her, were not presented to the jury. Given that half the jury had connections to the army or the Citadel, the failure to introduce a full and

[25]Petitioner has withdrawn those portions of Ground 10 that challenged his resentencing counsels' alleged failure to object to the judge's charge of voluntary intoxication and of their injection of the issue of parole eligibility into the proceedings. (Petr's Memo in Oppo at 83).

accurate account of Petitioner's army service alone was a critical omission.

(Petr's Memo in Oppo at 106). Petitioner also challenges as faulty 1988 counsels' development of mitigating psychiatric/psychological evidence from Drs. Cogar, Malcolm and McKee.

Dr. Cogar, a clinical psychologist, testified at the resentencing trial that Petitioner suffered from "alcohol dependence, an anti-social personality disorder and symptoms of post-traumatic stress disorder." (App. 2219-20). He did not believe, however, that Petitioner had full-blown post-traumatic stress syndrome. (App. 2223). Dr. Cogar examined Petitioner again prior to the 1992 PCR hearing. After being supplied with additional defense information before the PCR hearing, he revised his diagnosis, eliminating the anti-social personality disorder and diagnosing a full-blown post-traumatic stress disorder. (App. 3222).

Psychiatrist Dr. Malcolm testified that Petitioner had an anti-social personality disorder. (App. 2281). Importantly, he also testified that Petitioner had some brain atrophy that might, in combination with alcohol, produce heightened impairment in a person. (App. 2280). He did not diagnose Petitioner as having post-traumatic stress disorder, (App. 2282). Again, when provided with additional information by defense counsel prior to the PCR hearing, Dr. Malcolm opined by affidavit, that was not subjected to cross-examination, that his diagnosis *might* well have been different. The court deems Dr. Malcolm's affidavit to be purely conjectural and of no probative value in evaluating counsels' alleged ineffectiveness. It does not say positively one way or another that Dr. Malcolm's diagnosis would have been different.

Dr. Geoffrey R. McKee, Chief of Forensic Psychology Services at the William S. Hall Psychiatric Institute and Associate Professor of Neuropsychiatry and Behavioral Sciences at the University of South Carolina School of Medicine, did not examine Petitioner before the 1988

resentencing proceeding or testify. However, in 1992 he first examined Petitioner at the request of the defense. At the PCR hearing he testified by deposition that Petitioner had post-traumatic stress disorder and an alcohol dependence that would have impaired his judgment at the time of the offense. He rejected a diagnosis of anti-social personality disorder, although he conceded another diagnostician could well have developed "anti-social disorder" as Petitioner's diagnosis. (App. 4568). In essence, then, Petitioner complains about the introduction of testimony that he had an anti-social personality disorder and the omission of testimony that he had full-blown post-traumatic stress disorder.

(ii). Legal Analysis

As Petitioner admits in his Memorandum in Opposition on Ground 10, there is no constitutional requirement for lawyers to conduct a "scorch-the-earth strategy" in gathering records and information for capital sentencing. *Hall v. Washington,* 106 F.3d 742 (7th Cir. 1997). In the familiar case of *Strickland v. Washington,* 466 U.S. 668 (1984), the Supreme Court set out a two-part test for ineffectiveness claims that applies in capital sentencings as well as guilt phases. First, the petitioner must show that "counsel's representation fell below an objective standard of

reasonableness." *Id.* at 684. The courts must be "highly deferential" in assessing this first prong. *Id.* at 689. Second, once that showing is made, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In a capital sentencing proceeding, this second prong requires that:

> When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded

that the balance of aggravating and mitigating circumstances did not warrant death. *Id.* at 695. "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* at 696. The court in *Strickland* found that a capital defendant failed to establish that counsel's performance had been deficient in failing to move for a continuance, in failing to request a psychiatric report, in failing to present character witnesses favorable to defendant, in failing to seek a presentence investigation report, and in failing to scrutinize properly the medical examiner's reports and cross-examine the experts. The Court found plausible strategic explanations for counsel's choices. Moreover, even assuming counsel had been deficient, the court concluded the defendant was not prejudiced:

> The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.

Id. at 699-700. In a case markedly similar to Petitioner's, *Burger v. Kemp,* 483 U.S. 776 (1987), the Court rejected the defendant's ineffectiveness claim based, in part, on counsel's failure to introduce *any mitigating evidence* at the capital sentencing hearing. The defendant claimed his counsel should have introduced evidence of the defendant's troubled childhood and family background. The Court found counsel's decisions were reasonable because of the risk inherent in calling those witnesses, who might have testified about the defendant's earlier difficulties with the police, involvement in drugs, and his violent temper. *Id.* at 792-94. *See also Whitley v. Bair,* 802 F.2d 1487, 1494-95 (4th Cir. 1986) (no prejudice from failure to investigate mitigating circumstances based on similar

grounds), *cert. denied,* 480 U.S. 951 (1987).

(iii). Conclusion

In applying the preceding standards to Petitioner's claim that 1988 counsel failed to develop available mitigating evidence concerning his tragic background, the court finds no merit to the claim. In the first place, the record contradicts Petitioner's contention that counsel did not highlight his troubled background. The defense presented numerous witnesses to testify to Petitioner's background. Jacqueline Mitchell, records custodian at Charleston Memorial Hospital, testified about Petitioner's March 27, 1966, emergency room admission for a stab wound to the abdomen (which had been inflicted by Petitioner's brother, Charles, who he later killed in 1970). Karen Garrison, records clerk at Petitioner's school, presented his school records revealing trouble adjusting to school.

Debra Rickett, of the Department of Youth Services, presented an extensive juvenile pretrial investigative report prepared in 1962, shortly after Petitioner and his brother Charles stole money from a drug store and broke in to a church. Petitioner and Charles had run away from home. They stole a car and drove it to Camden, South Carolina, where it ran out of gas, and they were jailed. The report detailed Petitioner's feelings of remorse. This report amply documented Petitioner's unhappiness with his home life, and his accounts of his father beating him over the head with a board. In the report Petitioner's mother described him as well-behaved and presenting no behavior problems. The report reflected that Charles and Petitioner were adopted as infants, and that their father, Benjamin Atkins, who Petitioner killed in the 1985 murders, had a nervous condition for which he received treatment. The report stated that Petitioner liked church, and was a thoughtful and sensitive boy. The report concluded that most of Petitioner's troubles stemmed from his troubled

home life with his father.

Linda Walters, Petitioner's girlfriend at the time of the 1985 murders, testified that she had loved Petitioner. She testified to Petitioner's drinking and aloofness, and that he was extremely vigilant at home.

Dr. Cogar, a psychologist at the Veterans Administration, testified about Petitioner's military background, for which he received a campaign medal, service medal, and good conduct medal. He stated that Petitioner had seen combat duty and the attendant casualties.

The court concludes, based on the above testimony from the 1988 resentencing, that counsel adequately presented evidence of Petitioner's family background and military record. This is not a case like *Burger* in which no mitigating evidence was introduced. Rather, the record reflects that all issues highlighted by Petitioner in his present claim were mentioned in the resentencing proceeding. Doubtless there comes a time in every trial in which counsel must weigh whether additional cumulative evidence is of incremental assistance to the defendant, or whether it handicaps the jury's ability to assimilate all that has previously been introduced. The court finds that counsels' performance was not ineffective in failing to develop Petitioner's background evidence. Moreover, even if their actions could be construed as somehow deficient, Petitioner cannot demonstrate prejudice. *Strickland*, 483 U.S. at 6990799. See *also Briley v. Bass,* 750 F.2d 1238, 1248 (4th Cir. 1984) (no prejudice from failing to call defendant's mother as a character witness at capital sentencing), *cert. denied.* 470 U.S. 1088 (1985).

As to Petitioner's argument that 1988 counsel failed to adequately present psychiatric/psychological evidence that he has post-traumatic stress disorder and not anti-social personality disorder, the court similarly finds no merit. It is clear from the record that Petitioner's

mitigating circumstance evidence rested primarily on his alcohol addiction and extreme intoxication at the time of the offense. This defense was well established in the record by the high blood alcohol reading Petitioner had even six hours after his arrest (.113) and by the testimony of his drinking habits and inability to remember anything regarding the killings.

In *Roach v. Martin,* 757 F.2d 1463, 1477 (4th Cir.), *cert. denied,* 474 U.S. 865 (1985), the court found that trial counsel had no "affirmative duty to shop around" for favorable expert opinions. The record reflects that Petitioner's counsel did consult Dr. Cogar and Dr. Malcolm and were able to elicit some evidence favorable to Petitioner. Dr. Cogar testified that Petitioner had symptoms of post-traumatic stress disorder and Dr. Malcolm testified that Petitioner had brain atrophy that magnified the effects of alcohol. Although Petitioner is unhappy with the label "anti-social personality disorder" that was assigned to him in the resentencing proceeding, even Dr. McKee, who testified at the PCR hearing, conceded that another clinician might well reach that conclusion. Viewing counsels' choices at the time of the resentencing, it is evident that counsels' actions and investigations were reasonable under the circumstances. Both trial experts agreed that Petitioner had a drinking addiction, and that was a significant mitigating circumstance. Unfortunately, "many find it difficult to view the illegal use of narcotics under any circumstances as a mitigating factor." *Woomer v. Aiken,* 856 F.2d 677, 684 (4th Cir. 1988), *cert. denied,* 489 U.S. 1091 (1989). The same holds true for the use of alcohol. Simply because Petitioner's mitigating circumstance evidence did not prevail does not equate to a finding of counsels' ineffectiveness.

Moreover, the court places little weight on the "Monday morning quarterback" evidence supplied by Drs. Cogar and Malcolm. The fact that Dr. Cogar might change his diagnosis several years later after receiving additional evidence is not surprising or remarkable, given a field in which

similarly qualified experts so often reach sharply differing conclusions. Dr. Malcolm's affidavit does not even positively assert that his diagnosis is different today. And Dr. McKee, not consulted until 1992, concedes that another clinician could well diagnose anti-social personality disorder. None of this proves deficiencies of 1988 counsel.

However, even assuming that counsel were ineffective, the omission of the "anti-social personality disorder" testimony and the introduction of a full-blown "post traumatic stress disorder" would not have significantly altered the sentencing profile before the jury. Accordingly, Petitioner has failed to prove prejudice related to his 1988 counsels' handling of the psychological/psychiatric evidence.

I. Ground 11:

The 1988 resentencing trial judge's instruction that evidence introduced by Petitioner regarding his prior conviction for murder could only be considered in mitigation of punishment, and not in relation to whether the State had proved the existence of the statutory aggravating circumstance of murder by a person with a prior conviction of murder, violated the Eighth and Fourteenth Amendments.

In this claim Petitioner challenges the 1988 resentencing judge's instructions as to the jury's consideration of Petitioner's evidence regarding the circumstances of the 1970 murder conviction. Notwithstanding that Petitioner stipulated as to the existence of a 1970 murder conviction, Petitioner contends that he was entitled to an instruction that would have permitted the jury to disregard the 1970 conviction as an aggravating circumstance. As the state supreme court found when it rejected this claim:

> Although Atkins stipulated to his 1970 murder conviction, he was permitted, without restriction, to offer in mitigation, evidence and details concerning the conviction. Moreover, the trial judge instructed the jury that, notwithstanding the stipulation, "it is for your determination as to whether or not the 1970 murder conviction would be used as an aggravating circumstance in this case," and also charged that it "must

> make a unanimous finding that the state has proven beyond a reasonable doubt that the murder was committed by a person with a prior record of conviction for murder."
>
> We hold the charge adequately apprised the jury of both the state's burden to establish the aggravating circumstance and the jury's duty to consider, in mitigation, Atkins' evidence from the 1970 conviction.

Atkins, 399 S.E.2d at 762-63. At the 1988 resentencing, defense counsel read into evidence excerpts from the 1970 murder trial as well as the transcript of the aborted plea before Judge Singletary. In instructing the jury, the court charged that the State had the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. Additionally, the resentencing court was generous in its charge regarding the 1970 killing. The court essentially recharged the law of murder and voluntary manslaughter as well as self-defense. The court also took great pains to instruct the jury that the law on presumption of malice from use of a deadly weapon had changed since 1970, and gave the appropriate current charge. Thus, the trial judge in essence conducted a mini-trial on the 1970 conviction within the larger sentencing proceeding for the 1985 killings. The jury had before it all instructions applicable in 1988.

Nevertheless, Petitioner complains that the trial judge should have instructed the jury that it could "strike" the aggravating circumstance if it chose, rather than simply consider the 1970 circumstances as mitigating evidence (as the court instructed). A very subtle distinction exists between what Petitioner wanted and what he got. The court does not find this distinction to be constitutional error.

S.C. Code Ann. § 16-3-25(E)(2) requires that juries be allowed to hear mitigation evidence. This court concludes that the resentencing judge's instructions fulfilled this requirement to the extent constitutionally necessary. Petitioner was not precluded from introducing abundant mitigation

evidence regarding his background, tragic upbringing, and mental health---as well as explaining the complete circumstances behind the 1970 conviction. By allowing Petitioner to introduce all the evidence concerning the 1970 conviction, and by instructing the jury as to the then-current law, the court in essence permitted the jury to determine whether the conviction should be used as the sole aggravating circumstance under more favorable current law. The judge simply informed the jury that because the defense had stipulated to the 1970 murder conviction, that was an established fact in this proceeding. Reviewing the instructions in their totality, it is patently clear that the jury was extensively charged on mitigation evidence and particularly the circumstances of the 1970 prosecution. The legal instructions on murder, manslaughter, malice and self-defense, constitutionally updated, gave the jury the tools to fully appraise the weight to be accorded the 1970 conviction as an aggravating circumstance.

Even assuming *arguendo* the resentencing judge erred in the instructions, Petitioner cannot prevail. Under the harmless error analysis adopted in *Brecht v. Abrahamson,* 113 S.Ct. 1710 (1993), a habeas petitioner claiming trial error cannot prevail unless he can establish "actual prejudice." *Id.* at 1721-22. For the reasons set forth in Grounds 1, 2 and 3, the court has found the 1970 conviction is not constitutionally infirm. Accordingly, Petitioner could not have been prejudiced by the resentencing court's instruction.

J. Ground 12:
The 1988 resentencing trial judge's refusal to permit Petitioner to challenge his 1970 murder conviction, which served as the only aggravating circumstance at the resentencing trial, violated his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

In this claim Petitioner challenges the refusal of the resentencing judge to consider allegations of ineffective assistance of 1970 trial counsel and improper jury charges in the 1970 trial as grounds

to strike the use of the prior conviction as an aggravating circumstance.

At a pretrial hearing before the 1988 resentencing trial, defense counsel moved to strike the 1970 conviction as a valid aggravating circumstance. Two motions to strike were filed, one predicated on alleged ineffectiveness of 1970 counsel and the other predicated on one jury instruction (malice) subsequently found defective by the United States Supreme Court in other cases and another jury instruction (self-defense) later revised under state law. (App. 2538-67). By the time of the pretrial hearing, Petitioner had already pursued his unsuccessful state PCR application directly challenging the 1970 conviction on grounds of ineffectiveness. Judge McLeod had already dismissed the claim based on laches, and the state supreme court had denied certiorari. Accordingly, the 1988 resentencing judge, Judge Cottingham, concluded that the prior ruling was *res judicata* and precluded Petitioner from mounting another ineffectiveness challenge before him. As to the jury instruction issue, the court concluded that nothing in the retroactivity jurisprudence required a court to reconsider a prior murder conviction, which has been long settled, where the State seeks to use it as an aggravating circumstance. In light of the availability of a ready forum in PCR to review such collateral attacks, which Petitioner had done, Judge Cottingham did not find that he should reconsider the validity of the 1970 conviction.[26] As the court frankly concluded, "I am not going to try in this sentencing phase the question of effectiveness of counsel in the 1970 conviction. I want that up front, on the record, and if I'm wrong the South Carolina Supreme Court can reverse me."

[26]Petitioner contends that *Brown v. United States,* 483 F.2d 116 (4th Cir. 1973), should govern. For reasons discussed below, the court concludes that *Brown* was limited to the right to counsel issue by *Custis v. United States,* 511 U.S. 485 (1994).

(App. 2444).[27] Thus, Judge Cottingham denied the motions to strike the 1970 conviction as an aggravating circumstance.

Although Judge Cottingham did not reconsider the validity of the conviction used as the aggravating circumstance, he nevertheless allowed Petitioner to introduce evidence concerning the 1970 conviction. Thus, the jury heard portions of the transcript of trial, as well as the aborted plea before Judge Singletary. Further, Judge Cottingham informed the jury of the change in the law concerning malice and self-defense since the 1970 trial. It is obvious the jury was concerned about how to treat the 1970 conviction. The following question was received from the jury during deliberations: "Was conviction of murder, as stipulated, to be considered as definite conviction of murder." (App. 1191). In response, Judge Cottingham recharged the jury on the portion of his instructions that had addressed the 1970 murder, including that portion addressing the change in the law of malice and self-defense. [28]

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[27]Judge Cottingham's prediction was perhaps optimistic. At the close of the defense argument, the court remarked that they had retried the 1970 case "from A to Z." (App. 2345).

[28]Specifically, Judge Cottingham directed that:

> I charge you that, in 1970, the law was that a defendant, in a murder case, had to prove by a preponderance of the evidence that he acted in self-defense in order to be found not guilty. Since 1970, the law has changed, and now a defendant need not prove that he acted in self-defense in order to be found not guilty of murder; but, rather, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense in order to be found guilty.
>
> Likewise, the law on malice has changed since 1970. As I have told you, the elements of murder are the wilful killing of another with malice aforethought. In 1970, the jury would have been instructed and was instructed it could presume the element of malice from the use of a deadly weapon. The law is now that the jury cannot presume malice from the use of a deadly weapon but may only infer it from the use of a deadly weapon, and they are at liberty to accept or reject such inference. And, as I previously told you, the State must prove all the elements beyond a

In reviewing the 1988 resentencing judge's refusal to consider the validity of the aggravating circumstance as a matter of law, the state supreme court agreed with the trial judge that, "[Petitioner's] resentencing trial was not the proper forum for collateral attack upon that [1970] conviction." *Atkins,* 399 S.E.2d at 761-62. The court did, however, opine that perhaps a federal habeas proceeding might be the proper forum for such an attack. *Id.* at 218 n.1.

In renewing this claim in this forum, Petitioner asks the court to declare that the state court's failure to reconsider the validity of the 1970 conviction when used as an aggravating circumstance was constitutionally inadequate. The court declines to do so.

The general rule is that violations of state law and procedure which do not infringe specific federal constitutional protections are not cognizable under § 2254. *Estelle v. McGuire,* 502 U.S. 62 (1991). The threshold question here is whether Judge Cottingham's denial of the motions to strike infringed Petitioner's constitutional rights.

After considering this question at length, the court concludes that *Custis v. United States,* 114 S.Ct. 1732 (1994),[29] forecloses Petitioner's claim. There, the United States Supreme Court limited the grounds upon which a defendant may collaterally attack the validity of a prior conviction being used for enhancement purposes. The defendant in *Custis* challenged two prior convictions on the

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reasonable doubt.

(App. 2364-65).

[29]Two cases antedating *Custis* were *Burgett v. Texas,* 389 U.S. 109 (1967) (prior conviction invalid under *Gideon's* right to counsel could not be employed to invoke a recidivist offender statute) and *United States v. Tucker,* 404 U.S. 443 (1972) (extending *Burgett* to sentencing proceedings). Prior to *Custis*, a divergence of views had emerged as to the appropriate procedure for handling collateral attacks on prior convictions used for enhancement purposes. *See generally* Note, *Limits to the Collateral Use of Invalid Prior Convictions to Enhance Punishment for a Subsequent Offense: Extending Burgett v. Texas and United States v. Tucker*, 19 Colum.Hum.Rts.L.Rev. 123 (1987).

grounds of ineffective assistance of counsel. In affirming the conclusions of the district court and the Fourth Circuit that the court was not authorized to entertain the collateral challenge, the Supreme Court held that the only type of collateral attack that could be raised was one alleging a total denial of counsel, in violation of *Gideon v. Wainwright,* 372 U.S. 335 (1963).

In other words, under *Custis,* when a defendant challenges the use of a prior conviction for enhancement purposes in a new sentencing, the sentencing court should not entertain a collateral attack on the prior conviction unless the defendant asserts that the prior conviction was uncounseled under *United States v. Tucker,* 404 U.S. 443 (1972). *See also United States v. Bacon,* 94 F.3d 158 (4th Cir. 1996) (sentencing court only to entertain collateral challenge when prior conviction obtained in absence of counsel). Moreover, the court in *Custis* clarified that collateral challenges asserting ineffective assistance of counsel are not the equivalent of an uncounseled conviction challenge because, "none of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." 511 U.S. at 495.

Here, Petitioner argued before Judge Cottingham that the 1970 conviction was invalid based on alleged trial ineffectiveness, alleged appellate ineffectiveness, and improper jury instructions. Petitioner did *not* raise a *Tucker* challenge. Accordingly, Petitioner's claim did not rise to the level of a jurisdictional defect resulting from a failure to appoint counsel.

Although *Custis* was not a death penalty case, there is nothing in the opinion to suggesting a restrictive application. *Custis* reasoned that a total denial of counsel claim was unique, and could be determined fairly easily based on a review of the judgment roll itself. In contrast, entertaining a collateral challenge to a prior conviction based on ineffective assistance of counsel "would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state court

transcripts or records that may date from another era, and may come from any one of the 50 States." 411 U.S. at 495. The Court also based its holding on the interest in promoting finality of judgments and in showing respect in the federal courts for state court judgments. *Id.* The court finds those factors support application of *Custis* to Petitioner's claim.

The court is aware that one court has refused to extend *Custis* to a capital proceeding. In *People v. Horton,* 906 P.2d 478 (Calif. 1996), *cert. denied*, 117 S.Ct. 63 (1996), the state supreme court concluded that a sentence of death was "qualitatively different from a sentence of imprisonment, however long," and, therefore, the *Custis* rule restricting collateral challenges to uncounseled convictions should not apply. *Id.* at 520. This court does not find the reasons advanced in *Horton* persuasive. In fact, the court finds the reasoning of dissenting Justice Baxter compelling. *Id.* at 524-30. Although death penalty cases are treated differently in some regards, the court sees no basis to carve out an exception to the *Custis* rule that would run contrary to the principles expressly espoused in *Custis.*

Finally, even if Judge Cottingham's failure to reconsider the validity of the 1970 conviction could be deemed to violate Petitioner's constitutional rights, such error was harmless beyond a reasonable doubt. *Brecht v. Abrahmson,* 507 U.S. 619 (1993). For the reasons set forth above in grounds 1, 2 and 3, incorporated here by reference, Petitioner's 1970 murder conviction was constitutionally obtained. Accordingly, Petitioner suffered no prejudice.

K. Ground 13:

The use at the 1988 resentencing trial of Petitioner's 1970 murder conviction, which served as the only aggravating circumstance, violated Petitioner's rights guaranteed by the Eighth and Fourteenth to the United States Constitution.

This claim mirrors the claims advanced above in Ground 12. The court denies this claim on

the same reasoning. Petitioner had no Constitutional right to require the resentencing court to review the validity of the 1970 conviction, *Custis v. United States*, 511 U.S. 485 (1994), where Petitioner did not assert the conviction was uncounseled under *United States v. Tucker*, 404 U.S. 443 (1972).

In addition, the court also incorporates by reference its alternative findings as to the alleged ineffective assistance of Mr. Lesesne. Because the court has found that none of Petitioner's ineffectiveness claims as to the 1970 trial have merit, and that the 1970 murder conviction would not have been reversed in any appeal or state postconviction proceeding that might have looked at the merits, the unassailable conclusion is that Petitioner's 1970 murder conviction was constitutionally obtained. Accordingly, it served as a valid aggravating circumstance in Petitioner's 1988 sentencing proceeding.

L. Ground 15:

The prosecutor's racially inflammatory introduction of evidence that Petitioner flew the Confederate flag on Independence Day introduced an arbitrary and impermissible factor into Petitioner's capital resentencing proceeding that violated Petitioner's rights under the First, Eighth and Fourteenth Amendments.

One question that undoubtedly must have arisen in the resentencing jury's mind is Petitioner's "motive," if any, for the slayings. This was, indeed, a killing in which the brutal murder of Karen, a near-stranger victim, appears almost random. During the State's examination of Aaron Polite, Karen's father, at the resentencing hearing, the prosecutor inquired about prior difficulties the family had with Petitioner. Mr. Polite identified only two possible prior difficulties: (1) a neighborly dispute concerning Petitioner's dog, who menaced the Polite family as they entered the backyard; and (2) Fatha Patterson's disapproval of Petitioner's flying of the Confederate flag on Independence Day in 1985, four months before the murders.

As to the canine problem, Petitioner attempted to build a fence to confine his dog, but then found that the Polite family objected to that because it blocked their access to Benjamin Atkins' house. Petitioner's father ultimately made Petitioner pull down the fence. Fatha Patterson testified that Petitioner appeared angry over the situation. Petitioner's girlfriend, Linda Walters, corroborated that Petitioner did not like the fact that his father made him take the fence down.

As to Petitioner's flying of the Confederate flag, Mr. Polite testified that Fatha Patterson was upset over the flag and spoke to Benjamin Atkins about it. The flag was eventually taken down that day, although no witness actually heard Petitioner's father speak with him about it. There is at least an inference, however, that such a conversation might have taken place and, therefore, been an example of prior difficulty between Petitioner and the Polite family.

At trial, Petitioner's counsel did not object to this testimony. However, it was raised on direct appeal to the Supreme Court of South Carolina. Exercising the then-existing doctrine of *in favorem vitae*, the state supreme court considered the challenge to the admission of evidence of Petitioner's flying of the Confederate flag. Petitioner alleged then, as he does now, that it was a backdoor attempt by the prosecutor to introduce evidence that Petitioner was racially prejudiced. The court rejected Petitioner's challenge, finding the evidence relevant to Petitioner's motive for the killings. *Atkins,* 399 S.E.2d at 763.

This court finds that Petitioner has failed to state a cognizable claim on this issue. Although Petitioner valiantly attempts to phrase the claim as one arising from the intrusion of an arbitrary and impermissible factor into capital resentencing, in essence Petitioner's claim is a challenge to the admissibility of evidence under state law. The admission of evidence does not state a cognizable federal habeas claim. *Chance v. Garrison*, 537 F.2d 1212 (4th Cir. 1976).

Moreover, even if this challenge were cognizable by this court, the court finds it without merit. The court does not find that the prosecutor's brief introduction of evidence relating to Petitioner's flag flying habits constituted an attempt to show Petitioner's racial beliefs. *Cf. Dawson v. Delaware,* 503 U.S. 159 (1992) (evidence of racial attitudes admissible in capital sentencing when evidence is tied to the murder of the victim, is used to show the defendant's future danger to society, or is relevant to rebut mitigating evidence by defendant). Rather, it was, as was evidence concerning the canine difficulties, merely an attempt to explain the prior history and possible problems between Petitioner and his neighbors. Petitioner protests that the prosecutor's introduction of such evidence must have had a racial motivation because purportedly no juror could believe that Petitioner would have slain Karen Patterson for something so trivial and remote as a dispute with her mother over the Confederate flag. The court agrees that no rational human being could be prompted to kill over such a trifling incident. Regrettably, however, prisons are filled with persons who have killed for less. By saying this the court does not suggest that these murders necessarily flowed from either the canine or flag incidents, or a combination of both. It may be that this crime was, as Petitioner contends, a wholly random act. However, pursuant to state law, the decision of life imprisonment or the death penalty is to be based upon the characteristics of the individual defendant and the circumstances of the crime. *State v. Plath,* 313 S.E.2d 619 (S.C. 1984). The trial judge's decision that prior difficulties evidence was admissible as evidence of the circumstances of the crime was not erroneous.

M. Ground 16:
The 1988 resentencing trial court's use of a coercive instruction to induce the jury's final verdict and failure to grant a mistrial after the jury indicated they were "hung" violated Petitioner's Due Process Rights.

Petitioner's resentencing trial commenced on Monday, June 20, 1988, with jury selection. Testimony began on Thursday of that week, and by Friday, June 24, 1988, at 5:35 p.m., the jury began deliberations. At 8:59 p.m. that evening, the jury sent out a note saying, "We seem to have a hung jury, ten to two. Should we continue?" (App. 2391). The trial judge expressed his intention to give a supplemental instruction to the jury, which he referred to as an *"Allen"*[30] charge. (App. 2388). Defense counsel objected and argued that the trial court should sentence Petitioner to life imprisonment pursuant to S.C. Code Ann. § 16-3-20, which provides that:

> In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

The court rejected the request, indicating that it would not declare the jury deadlocked when they had only been deliberating three and one half hours. The judge stated that he would have the jury continue its deliberations, but he would let the jury decide whether they wished to continue that evening or return the following morning. The court further stated that "if they [the jury] want to continue tonight, then I'm going to give them the *Allen* charge." (App. 2388).

After the jury returned to the courtroom, the judge observed:

> You received this case at 5:35, and it's now ten after nine. And thus it is, you have engaged in the deliberations for some three-and-a-half hours. Of course, as you know, this case started on Monday, so we've been involved in the trial of this case for about five days, one way or another, with the exception of some portion of Wednesday afternoon when we recessed. So I will conclude that, having been involved in the trial of this case for four-and-a-half or five days, whatever it is, that three-and-a-half hours would not be sufficient for you to have deliberated fully.

(App. 2851). The court then invited the jury to return to the jury room to determine whether they

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[30] *Allen v. United States,* 164 U.S. 492 (1896).

wished to continue that night, or return in the morning. However, the forelady informed the court that prior to returning to the courtroom, the jury had "already discussed that, and we would like to recess for the night." (App. 2852). Accordingly, the court acceded to the jury's request to recess for the night and gave the standard instruction not to discuss the case.[31] The court gave no further instruction pertinent to the jury's previously referenced "hung" status. Deliberations reconvened the next morning[32] at 9:30 a.m. One and one-half hours later, the jury reached unanimous death verdicts. (App. 2413-15).

On direct appeal of the resentencing proceeding, Petitioner argued that the trial court's supplemental instruction improperly coerced the jury to return a verdict of death by giving the jury the impression that they must deliberate until they came to a unanimous decision of life or death. (App. 2713). Further, Petitioner argued that the court's instructions were coercive because they relayed the judge's personal opinion regarding the insufficiency of time the jury had deliberated. The state supreme court rejected Petitioner's challenge, noting that "the length of time a jury deliberates rests in the sound discretion of the trial judge," *State v. Atkins,* 399 S.E.2d at 763 (citing *State v. Bennett,* 190 S.E.2d 497 (S.C. 1972)). The court found no abuse of discretion in requiring the jury to continue deliberations.

In his present claim, Petitioner asserts that the trial judge's supplemental instruction, which

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[31] As explanation for why it would be inappropriate for the jurors to discuss the case with each other the court noted that "the reason for that is that your decision must be a unanimous decision of all twelve of you." (App. 2392). Petitioner contends that the reference to unanimity was coercive. This claim is more properly considered in the context of Petitioner's Ground 18, *infra.*

[32] The record reflects that the trial judge offered the next day to instruct the jury concerning the operation of S.C. Code Ann. § 16-3-20 (providing for life imprisonment if jury cannot reach verdict), but the defense declined. (App. 2406-07).

Petitioner refers to as "an *Allen* charge," (Petr's Memo in Oppo, at 146 n. 58), constituted a coercive *Allen* charge that fails the criteria established in *Lowenfield v. Phelps,* 484 U.S. 231 (1988). In *Lowenfield,* the Supreme Court adopted a contextual analysis to determine whether a challenged charge is unconstitutionally coercive. 484 U.S. at 237. The supplemental charge is to be considered in "its context and under all [the] circumstances." *Id.*

As a threshold matter, the court concludes that the challenged supplemental charge at issue here cannot properly be classified as an "*Allen*-type" or "*Allen"* charge. An *Allen* charge is an instruction issued during deliberations that advises "deadlocked jurors to have deference to each other's views, that they should listen, with a disposition to be convinced, to each other's argument." *United States v. Seeright,* 978 F.2d 842, 845 (4th Cir. 1992). The challenged instruction here shared none of the preceding characteristics. The court, in fact, abandoned any idea to give a true *Allen* charge once the jury requested recess for the night. In fact, as even Petitioner concedes, the court here "simply opined" that three and one-half hours of deliberation was not a sufficient period of time for deliberation in a case of this length and complexity. (Petr's Memo in Oppo at 151). Having determined, therefore, that the instant charge is not subject to examination as an *Allen* charge in this circuit, it remains for determination whether the supplemental charge could still be construed as unconstitutionally coercive.

The court thinks not. Based on the totality of the circumstances and the context of the challenged instruction, it is clear that the jury had not abandoned all hope of eventually returning a verdict when they returned to the courtroom. The forelady's response to the court that the jury had already resolved to continue the next day prior to returning to the courtroom suggests that, although the jury could not reach a verdict at that time, they had resolved to try again in the morning. Thus,

the judge's instruction cannot be considered in the context of a deadlocked jury but rather, of a jury that had voted that it had had enough for the day and wished to return the next day. The judge's mere observation that insufficient time had passed was a necessary application of S.C. Code Ann. § 16-3-20 to the circumstances of the case to determine whether "reasonable deliberation" had transpired. It did not constitute any type of coercive *Allen* charge. Thus, Petitioner's claim is without merit.

N. Ground 17:

The 1988 resentencing trial court's failure to dismiss the State's notice of intention to seek the death penalty due to the prosecutor's misconduct in serving a subpoena to a potential defense witness requiring him to deliver confidential records prior to trial violated the Sixth, Eighth and Fourteenth Amendments.

During Petitioner's resentencing trial, defense counsel moved to exclude from the State's case testimony and a report of psychologist Dr. Waid that was prepared by him prior to the 1986 trial. Defense counsel claimed the prosecutor's actions constituted prosecutorial misconduct.

Before Petitioner's 1986 trial, Dr. Waid examined Petitioner at the request of defense counsel and prepared a report of his findings. Prior to the 1988 resentencing hearing, an investigator, acting at the behest of the solicitor, contacted Dr. Waid. Dr. Waid told the investigator that he would give the State a copy of the report if he was subpoenaed. Subpoenas were issued directing Dr. Waid to appear and bring any appropriate reports or records to the trial. However, it appears Dr. Waid gave the report and records to the solicitor in advance of the trial. Dr. Waid also furnished a copy to the defense. The records contained a number of remarks attributed to Petitioner which the solicitor wished to use at trial. Dr. Waid's release of these records was made without prior notification to Petitioner and without any waiver of a purported attorney-client privilege. Arguably the solicitor's attempt to access the records violated the limited discovery guidelines imposed under Rule 5 of the

South Carolina Rules of Criminal Procedure and was a willful intrusion into privileged matter.

The defense objected that the Waid report was subject to an attorney-client privilege and that the prosecutor's wrongful access to the report violated Petitioner's constitutional right to a fair trial. Defense counsel requested that the court exclude the proposed testimony of Dr. Waid or the introduction of his report or records. Counsel further requested that, as a sanction for the State's improper subpoenas to Dr. Waid, the trial court dismiss the State's notice of intention to seek the death penalty. The court ruled that the State would be precluded from using Dr. Waid, his report or his records, but denied the defense request to strike the notice.

On direct appeal Petitioner urged that the trial court had erred in failing to strike the notice as a result of the solicitor's action in serving subpoenas for confidential records relating to Petitioner's examination by defense mental health experts. Petitioner argued that the State received confidential information regarding Petitioner's mental condition to which it would not otherwise have had access, thus depriving Petitioner of a fair sentencing proceeding. Petitioner alleged that the disclosure permitted the prosecution to improperly pry into Petitioner's case in mitigation.

The state supreme court concluded that excluding Dr. Waid's report, and prohibiting his testimony, was sufficient remedial action. The court found that Petitioner suffered no prejudice and therefore Petitioner's exception was without merit. *State v. Atkins,* 399 S.E.2d at 764.

In this proceeding Petitioner renews his assault on the solicitor's conduct in subpoenaing Dr. Waid and his medical records. He contends that the state court's decision not to strike the notice was erroneous because it failed to consider that the intrusion was intentional rather than inadvertent, posed a substantial threat to Petitioner's Sixth Amendment rights, and had no legitimate law enforcement purpose. In essence, Petitioner complains that the state court ruling imposing sanctions

was not sufficiently harsh. In fact, Petitioner frames the issue as "whether the relief granted by the trial court was adequate to remedy this deliberate and unjustifiable act." (Petr's Memo in Oppo at 163).

Like the trial court below, this court assumes without deciding that the Waid report and records are protected by attorney-client privilege. A critical consideration remains, however, whether Petitioner's Ground 17 asserts a ground for relief cognizable in this forum. The State argues that it does not. The court agrees.

Claims of prosecutorial misconduct are cognizable in federal habeas corpus. *Darden v. Wainwright,* 477 U.S. 168 (1986). Such misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process. *Greer v. Miller,* 483 U.S. 756 (1987). Moreover, such misconduct may result in an unlawful admission of evidence that deprives the defendant of a fair trial.

Here, however, no testimony concerning Dr. Waid's report was ever received in evidence or came before a fact finder for consideration. The trial judge appropriately ordered that the prosecution would not be able to use any information gleaned from Dr. Waid's report. Although Petitioner has vaguely alleged that the prosecution pried into the defense case for mitigating circumstances, Petitioner never details the specific harm incurred: how exactly was the trial of the case changed as a result of the solicitor's exposure to the records? Petitioner has failed to establish that the solicitor's conduct prejudiced him in any fashion.

The court concludes that the question of propriety of a sanction for violation of a state rule of criminal procedure is a matter of state law. The federal courts do not have jurisdiction over these types of challenges because they do not involve a violation of federal law or the Constitution. *Estelle*

v. McGuire, 502 U.S. 62 (1991). An error of state law rises to constitutional dimension only if it so infused the trial with unfairness as to deny due process. *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Review of Petitioner's resentencing trial convinces the court that the solicitor's purported violation of state criminal discovery rules did not infuse the trial with unfairness, or appear to change the trial in any material fashion. Accordingly, there is no merit to this contention.

O. Ground 18:
The 1988 resentencing trial court's penalty phase instructions are reasonably likely to have been interpreted by the jury to require that its findings regarding the existence of mitigating circumstances be unanimous, in violation of the Eighth and Fourteenth Amendments.

Petitioner argues that the resentencing judge's penalty phase instructions as to aggravating circumstance, life imprisonment, death penalty, and mitigating circumstances unconstitutionally suggested to the sentencing jury that it had to find the existence of a mitigating circumstance by unanimous decision. At the outset, it should be noted that Petitioner concedes that the actual instructions did not expressly state that unanimity was required on mitigating circumstances. However, Petitioner contends that the totality of the instructions suggested such a requirement.

It is true that the court instructed the jury that unanimity was required for several matters. The court instructed the jury it must unanimously find the existence of the aggravating circumstance (App. 2349-50); that it must unanimously agree to a death sentence (App. 2360); and that it must unanimously agree to recommend life imprisonment (App. 2631).[33] Petitioner contends that because the judge did not explicitly state that the jury did not have to agree unanimously on the existence of

[33]Petitioner argues this statement is a misstatement of South Carolina law because S.C. Code Ann. §16-3-29(c) allows a judge to dismiss the sentencing jury and sentence the defendant to life imprisonment in the event jurors cannot reach a verdict after reasonable deliberation. The court does not find the judge's instruction misstates South Carolina law because the instruction addresses only situations in which the jury is able to reach a verdict, not those in which a jury is deadlocked.

any mitigating circumstance, the jury---confused by the multiple references to unanimity in other contexts--most likely applied the instructions in a way that violates the Constitution. *Estelle v. McGuire,* 502 U.S. 62, 72 (1991). Petitioner relies on two factors to prove the likelihood of confusion in this case: (1) the collective use of the term "you" when referring to both aggravating and mitigating circumstances requirements; and (2) a law review study of capital jurors in South Carolina to the effect that greater than sixty percent of jurors in both life and death cases erroneously believed that they had to unanimously agree on a mitigating circumstance to recommend life imprisonment.[34]

The state supreme court rejected Petitioner's direct appeal exception on this point. The court found the totality of the instructions were not misleading, and pointed to the numerous instances in which the court had instructed that a life sentence could be imposed for "any reason or no reason at all," (App. 2361, 2363, 2364) and that the jury need not find mitigating circumstances in order to impose a life sentence. (App. 2363).[35] The trial court had also instructed the jury that it could impose a sentence of life imprisonment regardless of whether it found the existence of mitigating circumstances.

A sentencer in a capital case "may not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings v. Oklahoma,* 455 U.S. 104,

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[34]Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases,* 79 Cornell L. Rev. 1, 11 (1993).

[35]Justice Finney dissented on this point, finding that the judge's statement, "your decision must be a unanimous decision of all twelve of you . . .," misstated S.C. Code Ann. § 16-3-20 and tended to coerce the jurors in a capital case.

110 (1982). Requiring jurors to unanimously find mitigating circumstances violates this fundamental principle. *Mills v. Maryland,* 486 U.S. 367 (1988) (verdict form requiring that each mitigating circumstance be marked "yes" or "no" led to reasonable likelihood that jury construed it as requiring unanimity).

Viewing the instructions in their entirety, the court does not conclude that the instructions unconstitutionally suggested to the jury that its findings regarding the existence of mitigating circumstances had to be unanimous. As the Fourth Circuit found in a similar case, "this careful instruction by the sentencing court [was] sufficient to impose a unanimity requirement on aggravating circumstances and the other elements of the death sentence deliberations, but not to impose such a requirement as to mitigating circumstances." *Maynard v. Dixon,* 943 F.2d 407, 419 (4th Cir. 1991). In three other federal habeas actions, the Fourth Circuit, reviewing instructions nearly identical to those given here, dismissed the petitioners' contention that a probability of juror confusion resulted from the instructions about mitigating circumstances and unanimity. *See Arnold v. Evatt,* ___ F.3d ___, 1997 WL 249156 (May 14, 1997) (4th Cir.); *Kornahrens v. Evatt,* 66 F.3d 1350, 1364 (4th Cir. 1995); and *Middleton v. Evatt,* 77 F.3d 469, 1996 WL 63038 (4th Cir. 1996) (unpublished). The published decisions are binding on this court. Accordingly, Petitioner's claim is without merit.

P. Ground 19:
The numerous improper and prejudicial remarks contained in the prosecutor's closing argument at Petitioner's resentencing trial violated Petitioner's rights under the Eighth and Fourteenth Amendments.

Petitioner claims the prosecutor's closing argument was improper in three different respects. First, he argues that Solicitor Condon subverted the jury's role as an independent fact finder and

injected his personal opinion regarding the appropriateness of the death penalty in this case. Second, he contends that the solicitor denigrated Petitioner's Vietnam service record, which Petitioner relied on as mitigating circumstance evidence, by purporting to speak for the 50,000 American soldiers memorialized at the Vietnam Veteran's Memorial in Washington, D.C. Third, he urges that the solicitor's comments regarding Petitioner's possibility of parole if given a life sentence was speculation and invited the jury's consideration of immaterial matter.

On direct appeal from the resentencing, the state supreme court rejected Petitioner's contentions, finding that the solicitor's comments did not constitute improper comment. The court noted that the trial judge is vested with broad discretion in determining the propriety of closing arguments, *citing State v. Linder,* 278 S.E.2d 335 (S.C. 1981).

The solicitor's closing argument is transcribed at App. 2310-17. The pertinent portions which Petitioner finds objectionable as to the first exception [about the prosecutor's personal view] include:

> The only name for what he did to Karen Patterson is that it's a case that calls for the death penalty.
>
> . . .
>
> Now, your duty is not easy. We appreciate your service. And this is not a pleasant task. But under oath, as jurors, all of you have said that if the facts call for it and the law allowed it, you could vote for the death penalty. The facts in this case not only call for it, they demand it. And look at the character of this defendant, search the record. Murderer. Murderer. Murderer.

Relevant extracts pertaining to Petitioner's service record include:

> The defendant makes much of his service in Vietnam. And he can be proud of that. Let's talk about that. You know, there's a group of Americans now, going into middle age, who have served over there, our relatives, our friends, our fellow countrymen. They went over there. And there's a monument in Washington, D.C. made of black granite. If you go --- if you haven't --- you'll see fifty thousand names of Americans that we know, that we're related to and friends with, who gave their life

> in that conflict. Fifty thousand. And, throughout America's history, noble servicemen have given their lives in the service of this country.
>
> And you go to that wall in Washington, and there are fifty thousand names of soldiers who have died, of heros [sic]. You pick out any one of those names of the fifty thousand. Pick one out. Soldier, you've given the ultimate sacrifice. You've been there. Would your service in any way mitigate or excuse the horrible conduct of this defendant, the intentional, malicious murder of his father and of a 13-year-old, defenseless, innocent child? They would be insulted by the question were they alive, insulted by the question. To use that as an excuse for what went on here is insulting.

Portions relating to the Solicitor's comment regarding parole include:

> What happens? He laughs. Clifford Killingbeck. He laughs. He is enraged, but he laughs. The convicted murderer laughs. Of course, he is laughing. He wants to be sentenced to life imprisonment so he can get out in 20 years.

Petitioner contends these arguments were improper and inflammatory and require reversal of his death sentences. Misconduct by a prosecutor in closing argument may be grounds for reversing a conviction. *Berger v. United States,* 295 U.S. 78, 89 (1935). The fact that such comments may be "undesirable or even universally condemned," however, is not sufficient to reverse the verdict. *Darden v. Wainwright,* 477 U.S. 168, 181 (1986). The test is whether the remarks so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Id.* To determine whether a prosecutor's comments denied the defendant fundamental fairness, the reviewing court should consider: (1) the nature of the comments, (2) the nature and quantum of evidence before the jury, (3) the arguments of opposing counsel, (4) the judge's charge, and (5) whether the errors were isolated or repeated. *Arnold v. Evatt,* ___ F.3d ___, 1997 WL 249156 at 4-5 *(citing Lawson v. Dixon,* 3 F.3d 743, 755 (4th Cir. 1993)). The prosecutor's statements must be viewed in the context of the entire proceedings. *United States v. Young,* 470 U.S. 1, 11 (1985).

Applying the five preceding factors, the court will first consider the nature of the solicitor's

comments. As to the references to the appropriateness of the death penalty in this case, the court finds that these final closing comments did not improperly present the solicitor's personal beliefs to the jury. The comments merely asserted that the "facts of this case" or "the case" calls for the death penalty or demands it. Rather than incite passions or direct the jury to irrelevant matter, the solicitor invited the jury to inspect the facts and circumstances of the crime and the defendant, which he had just finished summarizing. This is precisely the task of a jury in a capital sentencing proceeding. The prosecutor's statement was confined to a legitimate recommendation as to the appropriate punishment.

As to the reference to Petitioner's service record, during the resentencing proceeding Petitioner relied on his military service and his alleged psychological and drinking problems as mitigation evidence. Examined in the context of the whole proceeding, the challenged statement merely invites the jury to examine the persuasiveness of a soldier's military record as justification for two brutal homicides.

The final objection concerns the solicitor's representation that Petitioner wanted a life sentence so that he could get out of prison in twenty years. Petitioner contends that if he had been sentenced to life imprisonment, he would not necessarily have been paroled after 20 years. Therefore, he contends the solicitor's comment misled the jury. In the first place, it must be remembered that it was defense counsel that requested and convinced the trial judge to instruct the jury that if Petitioner were to receive life imprisonment, he would not be eligible for parole for at least 20 years. Thus, it was defense counsel that injected the issue of parole eligibility into the proceeding. The judge's complete instructions on parole status informed the jury that just because an inmate becomes eligible for parole at some time does not necessarily mean that he will be paroled.

The solicitor's comment could not reasonably have been construed in the manner alleged by Petitioner in light of the trial court's instructions regarding parole.

Turning to the remaining four factors relevant to fundamental fairness, it is clear that Petitioner's claim is without merit. The nature and quantum of evidence before the jury was overwhelming. The evidence was uncontradicted that Petitioner killed his brother in 1970. In fact, Petitioner stipulated that he had a conviction for murder in 1970. The evidence was uncontradicted that Petitioner killed two persons, one of whom was a near stranger, in 1985. The closing arguments of the two defense counsel were considerably more lengthy, spanning App. 2317-2346. Based on the above factors, the solicitor's comments did not deprive Petitioner of due process.

Q. Ground 20:

The 1988 resentencing trial court erred in qualifying Jurors Emily K. Grimball and Gary B. Leyh even though these jurors were aware that Petitioner had previously been sentenced to death and had otherwise been exposed to prejudicial information regarding Petitioner's case, thus depriving Petitioner of the right to a fair and impartial sentencing jury guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner complains about the resentencing judge's qualification of two jurors who read newspaper accounts of the history of Petitioner's case, including the fact that he had been previously sentenced to death for the 1985 murders. One juror, Ms. Grimball, served as forelady of the jury, but the other juror, Mr. Leyh, served only as an alternate and never participated in the deliberations culminating in the death verdicts. Following a thorough *voir dire*, the state court found that both jurors were able to put the news article out of their minds and reach a verdict in the case based on the law charged and the evidence presented. This state court finding of fact, by the trial judge who was in a position to eye the jurors and observe their responses, is entitled to a presumption of correctness. *Patton v. Yount,* 467 U.S. 1025 (1984).

(i). Ms. Grimball

At the outset of *voir dire* the resentencing judge admonished the venire not to review media accounts of Petitioner's case. (App. 1228-29). When Ms. Grimball was subject to *voir dire* examination later that day she admitted she had read a newspaper article about the case in that afternoon's paper. The newspaper account revealed that Petitioner had previously been convicted and sentenced to death for the two 1985 murders but that the death sentences had been reversed on appeal. The article also revealed that Petitioner was on parole from a 1970 murder conviction at the time of the 1985 murders.

Under examination by the court and counsel, Ms. Grimball assured the court that she could forget the article and that it would not result in any preconceived notion as to the appropriate verdict. She stated she could base her decision wholly upon the law charged and the evidence presented at trial. She stated she could consider both life imprisonment and the death penalty. She confirmed to defense counsel that she could still consider life imprisonment notwithstanding that Petitioner been convicted of murder in 1970 and had two prior murder convictions in this case. She also assured defense counsel that even if Petitioner put up no evidence she would search the record for reasons to return a life imprisonment recommendation. (App. 1560).

Defense counsel sought to have Ms. Grimball excused for cause. Based on Ms. Grimball's *voir dire* responses that she would follow the court's instructions and reach a decision based on the evidence at trial, the court refused the defense request. When the trial judge qualified Ms. Grimball, he instructed her not to share any of the information she gleaned from the news article with any other juror. A jury was later impanelled that included Ms. Grimball.

On direct appeal, the state supreme court found no error in the trial judge's qualification of

jurors Grimball and Leyh. Noting that voir dire must be reviewed in its entirety, the court, citing *State v. Drayton,* 361 S.E.2d 329 (S.C. 1987), found that prior media exposure did not disqualify a juror who was able to follow the law and base his verdict upon the evidence at trial. *State v. Atkins,* 399 S.E.2d 760, 764 (S.C. 1990).

Petitioner here contends that Ms. Grimball's responses indicate that she was prejudiced against Petitioner, had a predisposition to impose the death penalty[36], and a propensity to disregard the court's instructions. He argues that she was irreparably tainted by her knowledge of the prior death penalty sentences, and that the error was compounded by the trial judge's selection of her as forelady. He further argues that her answers on voir dire were equivocal concerning her ability to put the article out of her mind and to follow the court's instructions. Thus, he argues that he was deprived of his Sixth Amendment right to a fair trial.

Petitioner also argues an Eighth Amendment violation. He contends that the jury's sense of responsibility was unfairly minimized by the knowledge of two prior death penalty verdicts in this case, *Caldwell v. Mississippi,* 472 U.S. 320 (1985) (prosecutor's reference to responsibility of higher court to review sentence violated Eighth Amendment's standard of responsibility).

"In the overwhelming majority of criminal cases, pretrial publicity presents few unmanageable threats to this important right [of a fair trial before an impartial jury]." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539 (1976). The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd,* 366 U.S. 717, 722 (1961). The Court has recognized that qualified jurors need not be ignorant of the facts and issues involved:

> To hold that the mere existence of any preconceived notion as to the guilt or

[36]This claim is considered in Ground 21, *infra.*

> innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 723. In *Murphy v. Florida,* 421 U.S. 794 (1975), the Court found that a juror's exposure to information about a defendant's prior convictions and to news accounts of the crime for which he was currently charged did not alone presumptively deprive a defendant of due process. In assessing potential prejudice, *Murphy* also recognized a distinction between exposure to largely factual information about a defendant's history and current charges and exposure to invidious or inflammatory materials. *Id.* at 801 n.4. Thus, where the trial judge's *voir dire* assured that the jurors could return a verdict based on the evidence, and the trial atmosphere had not been corrupted by press coverage, the defendant was accorded a fair trial. Moreover, the Court acknowledged the limited value of equivocal answers given by jurors to leading questions by counsel, where other statements by the juror indicated an absence of partiality. *Id.* at 801.

In *Tuggle v. Thompson,* 57 F.3d 1356 (4th Cir. 1995), the petitioner, a death-sentenced inmate, was not deprived of his constitutional right to an impartial jury. There, five of the petit jurors had read newspaper articles concerning the case, including one article that falsely stated that the petitioner had committed another rape. The Fourth Circuit found that the petitioner did not carry his burden to show that "the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an inference of actual prejudice." *Id.* at 1365 (quoting *Murphy,* 421 U.S. at 803). The court relied on the fact that each juror advised the court under oath that he could decide the case impartially and consider only the evidence presented. The court recognized that, "in this day of instant communication, it is not unusual for jurors to have heard or

read about a case, and such prior knowledge does not disqualify a person from becoming a juror . . ." *Tuggle,* 57 F.3d at 1365.

Here, Ms. Grimball assured the court she could follow instructions and reach a verdict on the evidence. Her exposure to the one article was brief, and it contained accurate, historical evidence about the case. Evidence as to some historical events, *e.g.,* that Petitioner had committed a murder in 1970, and had previously been found guilty of the two 1985 murders, was later introduced into the resentencing proceeding. The court does not find a Sixth Amendment violation based on the evidence here.

Moreover, the court rejects Petitioner's Eighth Amendment claim based on purported diminished juror responsibility. In *Romano v. Oklahoma,* 512 U.S. 1 (1994), the Court found that the admission in a death penalty trial of evidence that the defendant had already been sentenced to death in another case did not impermissibly undermine the sentencing jury's sense of responsibility. There, the *entire jury* was aware of the defendant's capital sentence whereas in the present case only Ms. Grimball knew that he had previously been sentenced to death and that the sentences had been reversed. She assured the trial judge she would not share that information with others. Accordingly, the court cannot find an Eighth Amendment violation arising from Ms. Grimball's access to one news report.

(ii). Mr. Leyh

As to Mr. Leyh, the court finds that Petitioner cannot complain of any resulting prejudice from alternate juror Leyh's media exposure. During *voir dire* the trial judge received Leyh's sworn assurance he would not inform any of the other jurors about the newspaper article, that he could follow the court's instructions, and that he would return a verdict based solely on the evidence.

Petitioner does not contend that Leyh violated this oath, or that anything he did had an effect on Petitioner's sentence.[37] Having reviewed the *voir dire* of Leyh, the court finds that the trial judge's qualification of Leyh was not erroneous. Even assuming *arguendo* there was error in Leyh's qualification, it was harmless beyond a reasonable doubt.

R. Ground 21:

The 1988 resentencing trial court erroneously qualified Jurors Emily K. Grimball and John Bozard, even though these individuals were predisposed to sentence Petitioner to death, thus depriving Petitioner of the right to a fair and impartial sentencing jury guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Petitioner complains about the trial judge's qualification of two jurors, Mr. Bozard[38] and Ms. Grimball.[39] He claims both jurors gave responses to *voir dire* that indicated they were predisposed to the death penalty, thereby depriving him of his constitutional rights. In this claim, as in Ground 20 *supra*, Petitioner relies on certain extracted statements from the jurors' responses that appear to indicate a partiality towards the death penalty. However, those responses were given in response to leading questions propounded by defense counsel. Upon review of the entire *voir dire*, the court concludes that the trial judge did not abuse his discretion in qualifying Ms. Grimball and Mr. Bozard.

Under the standards for obtaining a death-qualified jury under *Witherspoon v. Illinois,* 391 U.S. 510, 522 (1968), a member of a venire may be stricken for cause only if he is unwilling "to consider all of the penalties provided by state law." The determination whether a juror should be

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[37]The death penalty verdict forms returned in the Patterson and Benjamin Atkins cases reveal no signature of Mr. Leyh. (App. 2607-08).

[38]The State contends that Mr. Bozard was never seated but the verdict form reflects his signature. (App. 2607).

[39]Petitioner has abandoned this argument as to two other unseated jurors.

stricken is committed to the trial court's discretion. *Ristaino v. Ross,* 424 U.S. 589, 594 (1976). A *voir dire* examination must be reviewed in its entirety to determine whether the court erred in qualifying jurors. *Id.* The challenged jurors gave the following responses noted below.

(i). John E. Bozard, Jr.

Petitioner challenges Mr. Bozard as being death-prone based on the allegation that he believed that any intentional killing warranted the death penalty. Like many of the persons in the venire, Mr. Bozard gave some contradictory, equivocal and ambiguous responses to the confusing array of hypotheticals posed to him by counsel in *voir dire.* However, he assured the court that he would wait until he heard all the evidence and the judge's instructions before deciding the appropriate sentence. He stated that he could consider and vote for life imprisonment and the death penalty depending on the law charged and the evidence presented. Accordingly, Mr. Bozard met the *Witherspoon* criteria. (App. 1503-16).

(ii). Ms. Grimball

Petitioner challenges Ms. Grimball, the jury's forelady, on the basis that she was death-prone because of her prior knowledge that Petitioner had been on parole for a 1970 murder at the time of committing the two 1985 murders. Moreover, Ms. Grimball knew from a newspaper article that Petitioner had received the death penalty for those murders, but the sentences had been reversed on appeal. *See also* Ground 20, *supra.* Petitioner contends that Ms. Grimball harbored a belief that "life imprisonment" was only incarceration for a certain period of time followed by parole.

As to the issue concerning her purported disqualification based on media exposure, the court has treated that issue above in Ground 20. As to her alleged predisposition toward the death penalty, Ms. Grimball repeatedly assured the trial court and counsel that the article she reviewed did not give

her a preconceived idea as to the appropriate verdict in the case. She insisted that she would base her decision wholly upon the law charged and the evidence presented. (App. 1555-56). The fact that she was flexible and open-minded is illustrated by her reflection that she was "for [the death penalty] when it's necessary and also against it. It's one of those things that [she thought was] a very hard thing for anybody to make up their mind about." She also assured defense counsel she would search the record for reasons to give a life sentence, even if Petitioner put up no evidence. Based on the totality of her responses, the trial court did not err in concluding that Ms. Grimball satisfied the *Witherspoon* criteria.

S. Ground 22

The 1988 resentencing trial judge's refusal to submit to any voir dire examination regarding his views on capital punishment deprived Petitioner of his right to a fair sentencing proceeding in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

At Petitioner's resentencing trial, defense counsel, by written motion, moved to conduct a *voir dire* examination of the trial judge--Judge Cottingham--regarding his views on capital punishment. (App. 2509). At a pretrial hearing, Judge Cottingham denied the request, although he did inform counsel that while he was a member of the state legislature he had voted in favor of capital punishment.

In his direct appeal, Petitioner failed to assert the trial judge's refusal to submit to examination. Accordingly, the issue was never preserved for state court review. It may not now be raised in a collateral proceeding. *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980). The court therefore concludes that Petitioner is procedurally barred from pursuing this claim. *Kornahrens v. Evatt*, 66 F.3d 1350 (4th Cir. 1995).

Moreover, even if the claim were not procedurally barred, Petitioner could not prevail. The

Fourth Circuit Court of Appeals has twice rejected claims that trial judges in capital cases should be compelled to submit to *voir dire* examination about their views on capital punishment. *See Matthews v. Evatt,* 105 F.3d 907 (4th Cir. 1997), and *Kornahrens v Evatt*, 66 F.3d 1350. Accordingly, Petitioner's claim is rejected.

VII. CONCLUSION

Based on the foregoing, IT IS THEREFORE ORDERED that

(1) Respondents' Motion for Summary Judgment is GRANTED;

(2) Petitioner's Motion to Expand the Record is GRANTED;

(3) Petitioner's Motion for an Evidentiary Hearing is DENIED;

(4) Petitioner's Motion to Clarify the court's April 4, 1997, order is MOOT.

MOTION FOR RECONSIDERATION OR MOTION TO ALTER OR AMEND JUDGMENT

Should either party desire to file a motion for reconsideration or motion to alter/amend judgment, the following schedule shall apply:

(1) The movant must file with the Clerk's office, and serve by telefax and U. S. mails, any such motion, memorandum of law, and all attachments NO LATER THAN Friday, June 20, 1997;

(2) The party opposing the motion for reconsideration or amendment of judgment, shall have until Friday, June 27, 1997, to file and serve its response.

IT IS SO ORDERED.

CAMERON MCGOWAN CURRIE

UNITED STATES DISTRICT JUDGE

June 10, 1997
Florence, South Carolina